

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



379A

**APPELLANT'S PETITION FOR REHEARING**

---

IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 24,762**

---

WAIT RADIO, a co-partnership, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

MIDWEST RADIO-TELEVISION, INC., CARTER PUBLICATIONS, INC.,  
CLEAR CHANNEL BROADCASTING SERVICE, *Intervenors.*

---

United States Court of Appeals  
for the District of Columbia Circuit

APR 17 1972

*Nathan Paulson*  
CLERK

RAMSEY CLARK  
KENNETH C. BASS, III

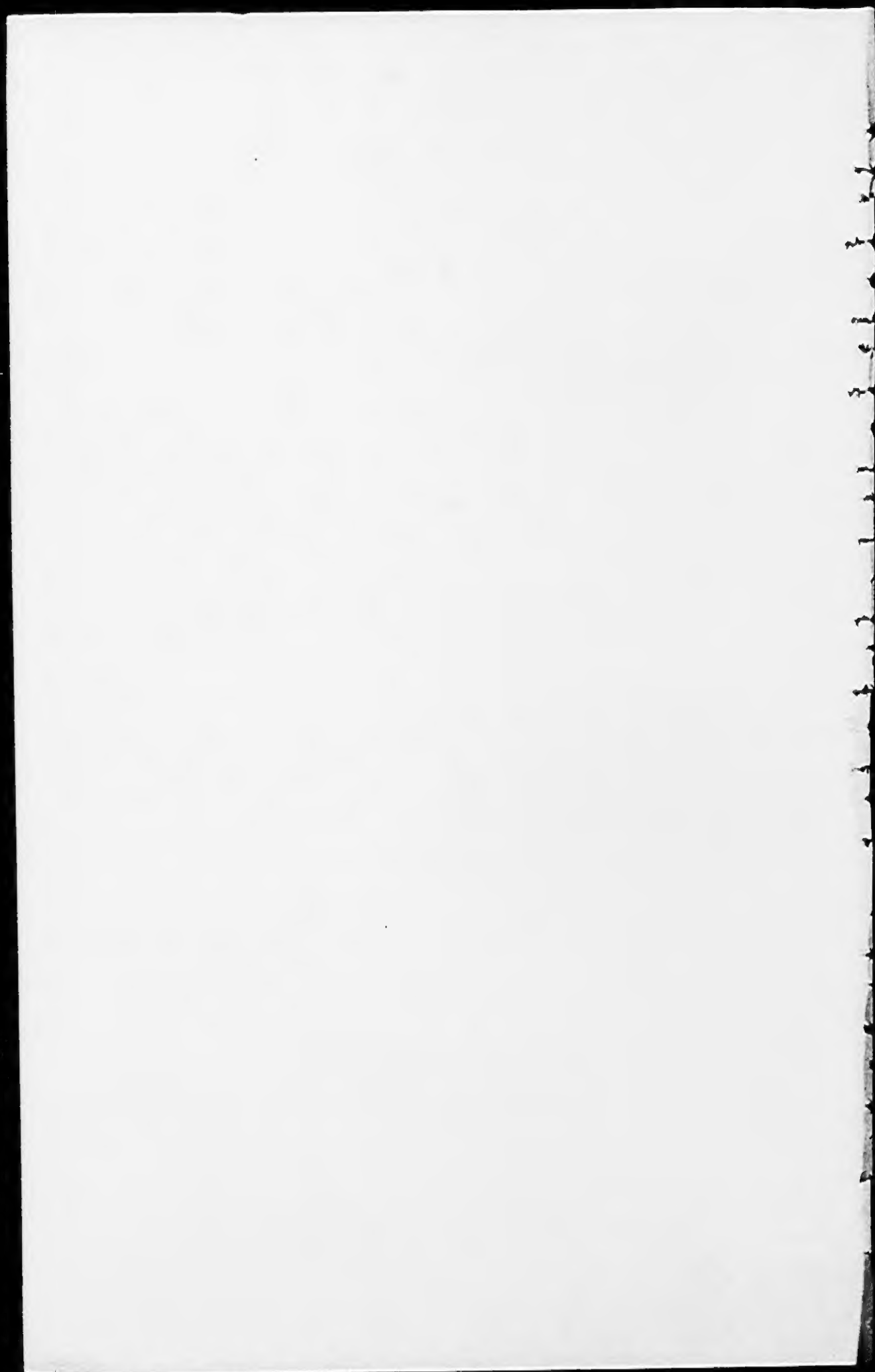
PAUL, WEISS,  
RIFKIND, WHARTON &  
GARRISON  
1775 K Street, N.W.  
Washington, D.C. 20006

*Attorneys for Appellant*

*Of Counsel:*

HARRY KALVEN, JR.







IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,762

---

WAIT RADIO, a co-partnership, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*  
MIDWEST RADIO-TELEVISION, INC., CARTER PUBLICATIONS, INC.,  
CLEAR CHANNEL BROADCASTING SERVICE, *Intervenors*.

---

**APPELLANT'S PETITION FOR REHEARING**

---

Pursuant to Rule 40, F.R. App. P., appellant WAIT Radio respectfully petitions for rehearing of the decision of this Court entered March 20, 1972, which affirmed orders of the Federal Communications Commission denying appellant's request for nighttime radio operations.

**I. STATEMENT OF THE CASE**

Appellant WAIT Radio filed an application with the FCC in 1967 requesting authority to operate full-time on 820 kHz, using a directional antenna. The FCC denied WAIT's request and refused to waive certain technical rules barring

the proposed operations. On appeal this Court reversed and remanded for further proceedings, holding that the FCC must give this application a "hard look" since it raised substantial First Amendment questions. *WAIT Radio v. FCC*, 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) (*WAIT I*). On remand the FCC again denied the requested waivers and a second appeal was taken to this Court.

Appellant argued both that the Commission's decisions conflicted with the Communications Act of 1934, 47 U.S.C. § 151 et seq. (Br. 8-20)\*, and that the orders violated the First Amendment. (Br. 20-23). In affirming the agency decisions this Court held there was no violation of the Communications Act. However, the opinion was silent with respect to any First Amendment considerations. Appellant respectfully submits that the Court failed adequately to consider the role of the First Amendment in judicial review of FCC decisions and that this failure justifies rehearing of the case.

## II. THE COURT APPLIED AN ERRONEOUS STANDARD OF REVIEW BY FAILING TO CONSIDER THE FIRST AMENDMENT

In its opinion this Court apparently treated this case as a customary review of an administrative agency decision. Thus the Court stated that the question was "whether the FCC exceeded its discretion in denying WAIT's application for authorization to broadcast during nighttime hours." *WAIT Radio v. FCC*, — U.S. App. D.C. —, — F.2d — (1972) (*WAIT II*) (slip op. at 3). And the decision was affirmed because the Court concluded there was no basis "for saying that the Commission's [decision] is either devoid of rationality, or is to be condemned as arbitrary and an abuse of discretion." *Id.*, slip op. at 16.

Appellant submits that the Court has invoked an improper standard of judicial review. While the "abuse of

\* References to "Br." are to the Brief for Appellant previously filed.

discretion" standard may be appropriate in non-First Amendment cases, in this case the reviewing court must apply a more stringent standard. In its first decision this Court recognized that the controversy was founded on a "non-frivolous First Amendment contention." *WAIT I*, *supra*, at 320, 418 F.2d at 1156. Because of this First Amendment issue the case was remanded for a "hard look" under higher standards of decision-making than those customarily applied by the FCC. Certainly the same First Amendment considerations which required the Commission to give this case special scrutiny now require this Court to take a "hard look" and to subject the FCC's decision to more probing judicial inquiry than the usual agency action.

*WAIT* contended in its initial brief that the First Amendment "requires a higher degree of precise administrative regulation than is necessary in non-First Amendment areas." (Br. at 22). This is especially true where, as here, an applicant seeks to provide a new radio voice presently unavailable to the public. As the Supreme Court has previously stated, "[i]t is the purpose of the First Amendment to preserve an unhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added).

Previous decisions of the Supreme Court indicate a more stringent standard of judicial review should be applied in this case. Thus it is well settled that regulations of speech demand a higher degree of precision than regulations of non-speech conduct. See *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604 (1967). To insure narrow regulation, courts must "look even more closely" than is necessary in other judicial proceedings. *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

Only last month the Supreme Court has once again indicated the lengths to which courts must go in cases involving the First Amendment and the extraordinary precision required of regulations of speech. *Gooding v. Wilson*, — U.S. — (No. 70-26, March 23, 1972) (40 U.S.L.W. 4329). And this Court has itself previously recognized that a higher standard of review should be applied in certain cases since "with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards." *Banzhaf v. FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082, 1096 (1968).

It would be anomalous indeed were courts to insist on a higher standard of rationality and precision from legislative, administrative, and executive arms of government and yet fail to apply the same rigorous test to their own deliberations. The factors compelling precision in the making of laws affecting First Amendment freedoms similarly justify more stringent standards of review in the courts. Customary administrative law principles cannot suffice where substantial First Amendment issues are involved.

Appellant does not contend that a higher standard of review necessarily applies to *all* FCC actions. For example, most licensing decisions involve selection among one or more competing applicants. In such cases the First Amendment pressure for more radio service is absent since presumably any one of the competing applicants will provide additional service. WAIT does contend that where the question is one of new service versus no service at all—as is the case here—the higher standard of review impelled by the First Amendment do apply. Formulation of this higher standard is concededly difficult, but however one may formulate it, it has not been met in this case.

*WAIT II* catalogs the considerations relied upon by the Commission. The Court candidly admits that "[t]here are



respects in which the Commission's opinion presents problems . . ." *WAIT II, supra*, slip op. at 16. However, the FCC's decision is apparently affirmed because it is not irrational, arbitrary or an abuse of discretion.\* In other words, while the Commission's decision was bad, it was not bad enough. Appellant submits that, while the Commission's orders may pass these tests, they do not in any way demonstrate reasons sufficient to deny WAIT's proposed addition to the nighttime radio services now available in Chicago. Under proper First Amendment standards, the FCC should grant WAIT's application.

In essence the effect of these two decisions is a rule of administrative law requiring more stringent *procedures* in First Amendment areas without any accompanying requirement for a more stringent *substantive* standard. Recently this Court has recognized that judicial review of administrative procedure alone is insufficient:

"We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise." *Environmental Defense Fund, Inc. v. Ruckelshaus*, — U.S. App. D.C. —, 439 F.2d 584, 597 (1971) (footnotes omitted).

WAIT respectfully submits that, as recognized in *Environmental Defense Fund, Inc. v. Ruckelshaus*, the time has

---

\* The standard of review applied in this case is similar to the "substantive due process" test. Under that test the Constitution requires that governmental regulation "shall not be unreasonable, arbitrary or capricious." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). But that minimal standard required of all governmental regulation has never been a sufficient test for the validity of laws affecting First Amendment rights. Where speech is involved the government's justification must be far more compelling.

come for judicial intervention in the substantive aspects of communications law. Because of the First Amendment such intervention is justified in this case. Appellant submits that the FCC has no "administrative expertise" in the First Amendment. To the contrary such considerations are peculiarly matters of judicial expertise.

### CONCLUSION

The case should be reheard with attention devoted to the First Amendment issues.

Respectfully submitted,

RAMSEY CLARK  
KENNETH C. BASS, III

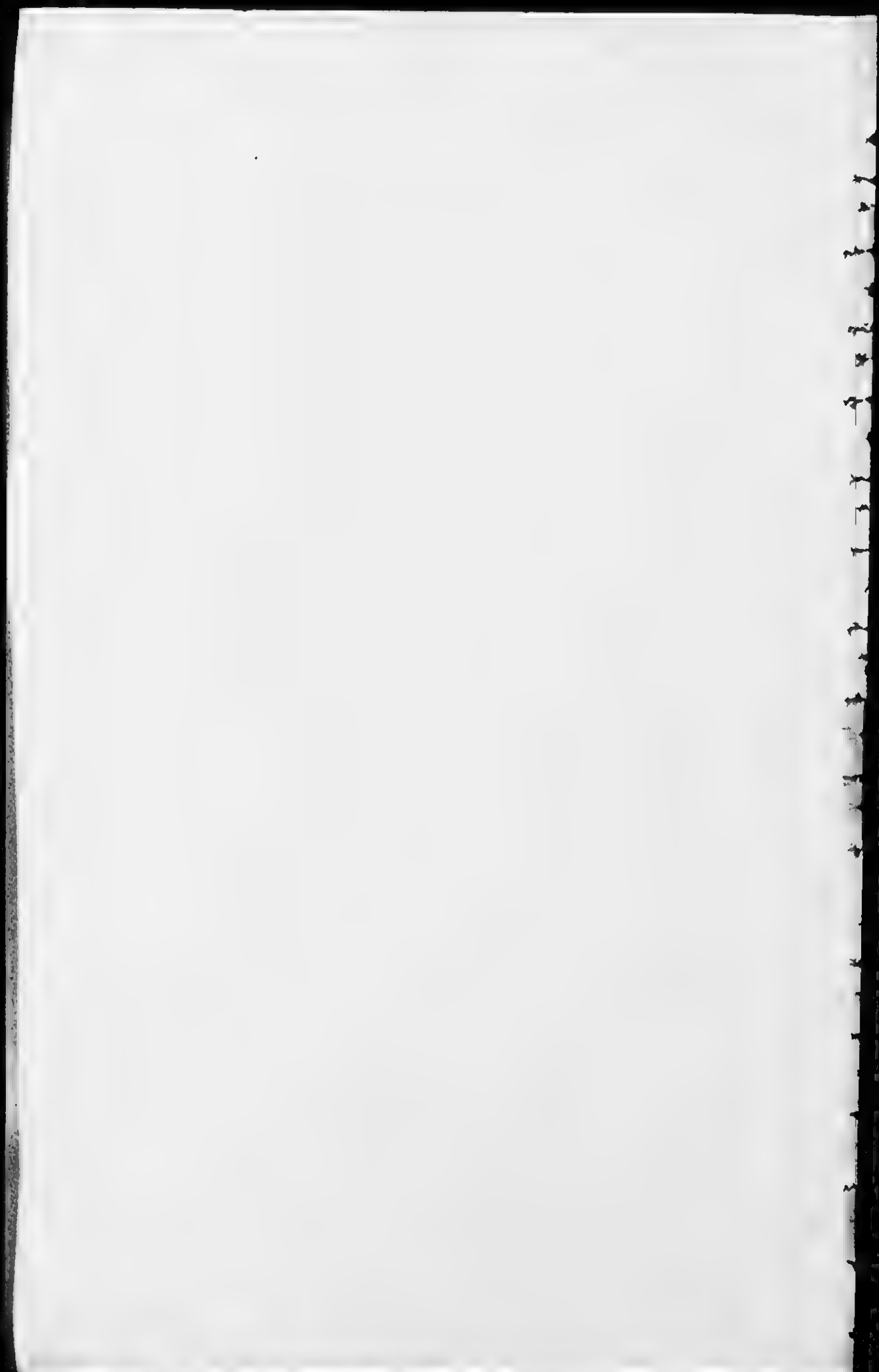
PAUL, WEISS,  
RIFKIND, WHARTON &  
GARRISON  
1775 K Street, N.W.  
Washington, D.C. 20006  
293-6370

*Attorneys for Appellant*

*Of Counsel:*

HARRY KALVEN, JR.

April 17, 1972  
Washington, D. C.



36-3

---

IN THE  
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 24,762  
\_\_\_\_\_

United States Court of Appeals  
for the District of Columbia Circuit

FILED JAN 11 1971

WAIT RADIO, a co-partnership

*Shirley J. Paulson*  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee,*

MIDWEST RADIO-TELEVISION, INC.,

CARTER PUBLICATIONS, INC.,

CLEAR CHANNEL BROADCASTING SERVICE,

*Intervenors*

\_\_\_\_\_  
ON APPEAL FROM MEMORANDUM OPINIONS AND ORDERS  
OF THE FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

JOINT APPENDIX

\_\_\_\_\_



## TABLE OF CONTENTS

	JA Page
Application filed on behalf of Radio Station WAIT .....	1
Exhibit 5 - Applicant's programming practices .....	20
Exhibit 6 - Correspondence, etc., City Of Park Ridge ...	34
Exhibit 7 - Program descriptions .....	41
Exhibit 9 - Newspaper clips .....	57
Engineering Statement .....	60
Request for Waiver and Petition for Oral Presentation, filed on behalf of Radio Station WAIT .....	72
Letters Endorsing Station WAIT received by the Commission March 20, 1967 .....	75
Letter Endorsing Station WAIT received by the Commission March 23, 1967 .....	77
Opposition to Request for Waiver and Petition for Oral Pre- sentation, filed on behalf of A. H. Belo Corporation, re- ceived by the Commission April 17, 1967 .....	78
Opposition of Carter Publication, Inc., to Request for Waiver and Petition for Oral Presentation, received by the Commission April 17, 1967 .....	80
Engineering Statement in Behalf of Carter Publica- tions, Inc. ....	88
Opposition to "Request for Waiver and Petition for Oral Pre- sentation", filed on behalf of Clear Channel Broadcasting Service, received by the Commission May 4, 1967 .....	91
Opposition of Midwest Radio Television Inc., received by the Commission May 11, 1967 .....	105
Reply of WAIT Radio to the Oppositions, received by the Commission June 21, 1967 .....	109
Memorandum Opinion and Order released Oct. 30, 1967 ...	130
Petition for Reconsideration by WAIT Radio .....	134
Engineering Statement, Nov. 1967 .....	146
Opposition of Carter Publications, Inc. to Petition for Re- consideration .....	167
Engineering Statement .....	173
Opposition to Petition for Reconsideration by Clear Chan- nel Broadcasting Service .....	180
Opposition to Petition for Reconsideration by A. H. Belo Corporation .....	183
Memorandum Opinion and Order released Jan. 31, 1968 ...	184
Prehearing Stipulation .....	186

BEST COPY AVAILABLE

from the original bound volume

Decision of the United States Court of Appeals for the District of Columbia Circuit, dated 6/24/69 .....	189
Request for Specification of Issues and Petition for Oral Presentation .....	204
Engineering Statement of WAIT for October, 1969 .....	212
FCC Opinion, released 12/23/69 .....	224
Letter, dated 2/4/70, from Ramsey Clark to FCC .....	228
Supplemental Engineering Statement of WAIT for 1/29/70 .....	230
Letter, dated 1/14/70, from Laurence Roslow (Pulse, Inc.) to WAIT .....	260
Letter, dated 1/15/70, from Robert Owens (American Research Bureau) to WAIT .....	261
Engineering Statement of A. Earl Cullum, Jr., and Associates, Consulting Engineers for WBAP/WFAA .....	262
Supplemental Engineering Statement for WAIT (3/23/70) .....	283
Excerpts from Oral Argument before the Commission (2/9/70) .....	290
FCC Opinion, released 5/11/70 .....	291
Petition for Reconsideration of Memorandum Opinion .....	301
Opposition of Midwest Radio-Television to Petition for Reconsideration .....	310
Joint Opposition to Petition for Reconsideration .....	315
FCC Opinion released 10/5/70 .....	319
FCC Errata released 10/13/70 .....	324

FCC Form 301  
Nov. 1965

Form Approved  
Budget Bureau No. 52-R014.19

Section I

UNITED STATES OF AMERICA  
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR AUTHORITY TO CONSTRUCT A NEW BROADCAST STATION OR MAKE CHANGES IN AN EXISTING BROADCAST STATION

INSTRUCTIONS

A. This form is to be used in applying for authority to construct a new standard, commercial FM, or television broadcast station, or to make changes in existing broadcast stations. This form consists of this part, Section I, and the following sections:

Section II, Legal Qualifications of Broadcast Applicant  
Section III, Financial Qualifications of Broadcast Applicant  
Section IV-A, Statement of Program Service of Broadcast Applicant (AM-FM)  
Section IV-B, Statement of Program Service of Broadcast Applicant (TV)  
Section V-A, Standard Broadcast Engineering Data  
Section V-B, FM Broadcast Engineering Data  
Section V-C, Television Broadcast Engineering Data  
Section V-D, Antenna and Site Information

B. Prepare three copies of this form and all exhibits. Sign one copy of Section I. Prepare one additional copy (a total of four) of Section V-G and associated exhibits. File all the above with Federal Communications Commission, Washington, D. C. 20554. A SEPARATE AND COMPLETE APPLICATION (IN TRIPLICATE) MUST BE FILED FOR EACH AM STATION, EACH FM STATION, AND EACH TV STATION.

C. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on page 2 of this Section. Show date of preparation of each exhibit, antenna pattern, and map, and show date when each photograph was taken.

D. The name of the applicant stated in Section I hereof shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office, and the name of the association. In other Sections of the form the name alone will be sufficient for identification of the applicant.

E. Information called for by this application which is already on file with the Commission (except that called for in Section V-G) need not be refiled in this application provided (1) the information is now on file in another application or FCC Form filed by or on behalf of this applicant; (2) the information is identified FULLY by reference to the file number (if any) the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public. (See Section 1.526 of the Commission's Rules and Regulations, "Records to be maintained locally for public inspection by applicants, permittees, and licensees.")

F. This application shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; by a member who is an officer, if the applicant is an unincorporated association; by a duly elected or appointed official as may be competent to do so under the laws of the applicable jurisdiction, if the applicant is an eligible government entity; or by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the applicant, separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief or faith (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

File No.

1. Name of applicant (See Instruction D)  
Maurice Rosenfield, Lois F. Rosenfield, Harold A. Weiss, Robert G. Weiss, Devoe, Shadur, Mikva and Plotkin, a co-partnership

Street Address  
208 South LaSalle Street  
Room 1270

City State ZIP CODE  
Chicago Illinois 60604

2. Name of person to whom communications should be sent, if different from item 1  
McCoy, Ming & Black

Street Address  
123 West Madison Street  
City State ZIP CODE  
Chicago Illinois 60602

3. Purpose of application (check one)  
See "Exhibit 1" attached hereto  
☐ New Station ☒ Change existing station facilities

4. (a) Requested facilities

Type of station (as Standard, FM, Television)

Standard

Frequency	Call	Channel No.	Power in kilowatts		Minimum hours of operation daily
			Night	Day	
820 kc	WAIT		10	5	24

hours of operation

Unlimited <input checked="" type="checkbox"/>	Sharing with (Specify Stations) WFAA WBAP	Other (Specify)
Daytime only		
Limited		

Station location

City	State
Chicago	Illinois

(b) If this application is for changes in an existing authorization, complete Section I and any other sections necessary to show all substantial changes in information filed with the Commission in prior applications or reports. In the spaces below check Sections submitted herewith and as to Sections not submitted herewith refer to the prior application or report containing the requested information in accordance with Instruction E. If contemplated expenditures are less than \$5,000, complete paragraph 1 of Section III only. Section IV is not required for applications for minor changes not involving change in power, change in frequency, change in hours of operation, or moving from city to city.)

Section No. Para. No. Reference (File or Form No. and Date)

☒ Section II 3&8 See FCC BAL 4564

☒ Section III

☒ Section IV

☒ Section V

Have there been any substantial changes in the information incorporated in this application by reference in this paragraph? Yes ☐ No ☒

3. If this application is contingent on the grant of another pending application, state name of other applicant and file number of other application.

Not Applicable

AVAILABLE

bound volume

G. Before filling out this application, the applicant should familiarize himself with the Communications Act of 1934, as amended, Parts 1, 2, 73 and 17 of the Commission's Rules and Regulations and the Standards of Good Engineering Practice.

BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

FOR COMMISSION USE ONLY

FCC Form 302

Section I, Pa

THE APPLICANT hereby waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934).

THE APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

THE APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representation and that all the exhibits are a material part thereof and are incorporated herein as if set out in full in the application.

#### CERTIFICATION

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this 10th day of February, 19 67

(This Section should not be signed and dated until all the following Sections and Exhibits have been prepared and attached.)

MAURICE ROSENFELD, LOIS F. ROSENFELD,  
HOWARD A. WEISS, ROBERT G. WEISS, and  
DEVOE, SHADUR, MIKVA and PLOTKIN, a c  
partnership d/b/a WAIT RADIO

(NAME OF APPLICANT)

INCLUDE FILING FEE WITH THIS APPLICATION. SEE  
PART 1 OF FCC RULES FOR AMOUNT OF FEE.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM  
ARE PUNISHABLE BY FINE AND IMPRISONMENT.  
U. S. CODE, TITLE 18, SECTION 1001.

By

*Maurice Rosenfeld*

(SIGNATURE)

MAURICE ROSENFELD

Title Managing Partner

If applicant is represented by legal or engineering counsel, state name and most office address: McCoy, Ming & Black, Attys. 123 W. Madison, Chgo  
Walter F. Kean, 19 E. Quincy, Riverside, Ill.

EXHIBITS furnished as required by this form:

Exhibit No.	Section and Para. No. of Form	Name of officer or employee (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title
1	I, Par. 1	Maurice Rosenfeld (direction)	Managing Partner
1a	I, Par. 1	" "	" "
2	III, Par. 1C	" "	" "
3	III, Par. 2	" "	" "
4	" " "	" "	" "
5	IV A	" "	" "
6	" "	" "	" "

BEST COPY

from the origin

7	" "	" "	" "	" "
8	" "	" "	" "	" "
9	" "	" "	" "	" "
10	" "	" "	" "	" "
Figures -11	V	Walter D. Kean	Engineering Counsel	

\* \* \*

[10]

EXHIBIT 1  
WAIT FORM 301  
February 10, 1967

REQUEST FOR AUTHORITY TO CONSTRUCT AND OPERATE  
FACILITIES TO ENABLE WAIT TO OPERATE NIGHTTIME WITH  
A DIRECTIONAL ANTENNA ON 820 kc, A "CLEAR CHANNEL"

WAIT Radio is a standard AM broadcast station in Chicago, Illinois, authorized by the Commission to operate daytime on 820 kc with 5,000 watts power, non-directional. Radio stations WFAA and WBAP at Dallas and Fort Worth, Texas, respectively, conduct a share time operation on the same channel full time with 50,000 watts, non-directional. WAIT now petitions the Commission for leave to operate full time on the same channel with 10,000 watts power but with a nighttime directional antenna.

In support of this application WAIT shows to the Commission the following:

1. Section 73.25 of the Rules and Regulations of the Commission designates 820 kc as a "clear channel" on which only a single station will be authorized to operate on unlimited time. The history of the "clear channel" concept and its application discloses that this is a method of allocating some of the channels available for standard broadcasting in the United States sole-

ly for the purpose of providing skywave or secondary service at night free from objectionable interference to distant rural or sparsely populated areas where it may not be

[11]

economically feasible to provide local stations. Such areas receiving nighttime skywave or secondary service and no ground wave or primary service are commonly referred to and identified as "white areas," mapped as such by the Clear Channel Broadcasting Service of Washington, D.C., a trade association of certain 50,000 watt stations. In the Matter of Clear Channel Broadcasting in the Standard Broadcast Band, Docket No. 6741, FCC 62-1214, on its reaffirmation of the original Report and Order in that proceeding, FCC 61-1106, the Commission in 1962 concluded that 820 kc should continue as a "clear channel" because the Texas stations were "well located—by directing radiation towards the northwest—to provide needed skywave service to all states west of the Mississippi River except for a portion of Louisiana, Arkansas and Washington." (Emphasis supplied). Accordingly, WFAA/WBAP continue to be jointly designated as a single Class I station.

2. By the use of a directional antenna, however, WAIT could broadcast nighttime on 820 kc/s without interfering with the WFAA/WBAP skywave service to the northwest. Indeed, WAIT could broadcast nighttime with the planned directional antenna on 820 kc/s without interference to WFAA/WBAP in any "white" area. See the attached map and overlay marked Exhibit 1a. The map was prepared, publicly distributed, and filed with the Commission by the said Clear Channel Broadcasting Service in Docket No. 6741. The overlay conforms to Figure 10 of the "Engineering Statement", Sec. V-A of this application.\*

---

\*What appears on that map to be a "white area" in southwestern Indiana is an area which in fact is served by groundwave from WHAS, a 50,000 watt



3. Section 73.182 of the Rules and Regulations of the Commission prescribes the engineering standards of

station in Louisville, Kentucky, operating on 840 kc. See figure 9 of the "Engineering Statement", Sec. V-A of this application. In view of this fact the certification by WAIT with respect to this map is limited to representing that Exhibit 1a is a true and correct copy of the Exhibit filed in Docket No. 6741.

[12]

allocation generally. Section 73.182(a)(1)(i) provides that Class I stations such as WFAA/WBAP shall be provided protection in the nighttime from stations on the same channel to the 0.5 mv/m fifty percent skywave contour. Section 73.182(w) defines the minimum ratio of the field intensity of a desired to an undesired signal for interference free service as 20:1.

[13]

4. The "Engineering Statement" in this application shows that with a directional antenna, the design and characteristics of which are detailed, WAIT could operate nighttime without interference to WFAA/WBAP in excess of a 20:1 ratio in any area included in the WFAA/WBAP 0.5 mv/m fifty per cent skywave contour not serviced by primary groundwave from one or more standard broadcast stations. That is to say, by the use of this directional antenna WAIT could conduct a nighttime operation without objectionably interfering with the WFAA/WBAP skywave service to any "white" area within the protected contour. Clearly there would be no objectionable interference by WAIT's nighttime operation in any part of the northwest. Indeed, the only interference with WFAA/WBAP skywave service in excess of the 20:1 ratio anywhere west of the Mississippi River by such nighttime operation of WAIT would be in a part of Iowa which receives primary groundwave service from at least three stations, WHO at Des Moines, Iowa, KFAB at Omaha, Nebraska, and WNAX at Yankton, South Dakota; in part of Minnesota served by at

least two (2) stations, KFAB and WNAX; in part of South Dakota served by at least one (1) station, WNAX. There would be no interference to those stations by WAIT.

5. It thus appears that the present limitation of the nighttime use of the 820 kc/s channel is substantially in excess of any limitation necessary by Commission standards to assure service by WFAA/WBAP to the "white" area in the northwest. The WFAA/WBAP 0.5 mv/m fifty percent skywave contour, because its service is non-directional, extends in a circle with a radius of more than 700 miles from their transmitters. That contour extends northwest only as far as the southeastern tip of Wyoming and is short of the northwestern boundary of Colorado, Utah and Wyoming. To the northeast, however, the contour extends across the whole of Oklahoma, Nebraska, Kansas, Missouri, most of Iowa and Illinois and a part of Indiana. To the east the contour covers Texas, Louisiana, Mississippi, Alabama, the eastern portion of Georgia and the major part of Tennessee and Kentucky.

[14]

6. This excessive limitation on the use of the 820 kc/s channel deprives the listening audience in the Chicago area of additional radio service which WAIT wants to supply and places WAIT at a competitive disadvantage in the Chicago market with no compensating advantage to listeners in other areas. Certainly it is not the intention of either the Communications Act or the Rules of the Commission to prefer one licensee over another, or to create a "cartel", but this is precisely the effect of excessive and undue limitation on the use of the 820 kc/s channel so that the limitation may be beyond the power of the Commission.

7. Indeed, the provision of § 73.23(b) of the Rules which would permit pre-sunrise operation of WAIT if WFAA/WBAP agreed to it underscores this unintended effect of rigorous, enforcement of the "clear channel" limitation.



No such permission seems ever to have been given by a Class I-A station. More important here, repeated efforts by WAIT to secure such permission have been fruitless. Conversely, the Commission has approved duplicate unlimited use of channels designated as "clear" when that use did not result in "objectionable interference" with service of the Class I station in the secondary service area. See e.g. 650 kc/s, 660 kc/s, 830 kc/s, 870 kc/s, and 1040 kc/s. While the duplicate facilities on those channels are "off shore", by its action the Commission has recognized the validity of the principle that WAIT urges. That principle is that the policy of the Commission to enable service to "white" areas is satisfied by protection of the Class I station skywave to the 0.5 mv/m contour. WAIT asks only that its operation be no more limited.

8. One obvious effect of limiting the operation of WAIT to the period between sunrise at Chicago and sunset in Grapevine, Texas, the location of the Texas transmitters, is to impose on WAIT a fluctuating period of operation which varies in accordance with the seasons of the year.

[15]

Thus, in June, WAIT is free to operate from 4:15 a.m. to 7:45 p.m., central standard time. Since Chicago and its environs make use of daylight saving time from the end of April to the end of October, WAIT is authorized to operate in June from 5:15 a.m., to 8:45 p.m., local time. In contrast, in December and January, WAIT is not authorized to operate until 7:15 a.m., central standard time, and must sign off at 5:30 p.m., and 5:45 p.m., respectively.

9. These fluctuating broadcasting periods are confusing to the radio audience which finds no rational explanation for them, and seriously interferes with the service of WAIT to its listeners. A substantial portion of the radio audience consists of persons riding in automobiles, particularly to and

from work. In the Chicago area the "rush hour" extends from about 6:30 a.m. to 9:30 a.m., and the evening "rush hour" from 4:00 p.m. to 7:00 p.m. As a result of the limitations on WAIT's authority to operate in the months of November, December, January and February, its facilities are not available to part of the homeward bound listening audience. Many automobile radios are left set for the station being received in the evening. Thus, the next morning, even though WAIT is on the air, some portion of its potential audience may not be recovered.

10. Another substantial part of the radio audience consists of persons who use clock radios set to come on at a predetermined time, particularly in the morning. A large number of those receivers are set by their users when they retire the night before. WAIT is not on the air at any time after 8:45 p.m., Chicago local time. After WAIT leaves the air the radio audience does not have a WAIT signal to set the time-control device at night even though WAIT may be on the air in the morning at the time selected for the receiver to begin to operate.

11. Approximately 5,400,000 persons live in the Chicago area. More than ninety per cent of their households have radio receivers. At least ninety per cent of the more

[16]

than 2,000,000 automobiles in the area are equipped with radios. It is estimated that 250,000 clock radios were sold in the Chicago area in 1965 alone. It is readily apparent, therefore, that the competitive disadvantage to WAIT extends to a substantial part of the Chicago radio market.

12. The Chicago radio audience is composed of persons of many varied tastes and needs. The area is served by more than twenty-five AM stations and sixteen FM stations. Of the AM stations serving the Chicago area five are Class I stations, WMAQ, 670 kc/s; WGN, 720 kc/s; WBBM, 780 kc/s;

WLS, 890 kc/s; and WCFL, 1000 kc/s. By §73.25 of its Rules the Commission has authorized assignment of Class II-A stations to be located in the northwest on the four of these channels, formerly "clear." This has no effect, however, on the limitation on service to the Chicago area and the competitive disadvantage to WAIT. Nighttime operation by eight other Chicago area stations is authorized. These are WIND, 560 kc/s; WJOB, 1230 kc/s; WSBC, WCRW and WEDC sharing time on 1240 kc/s; WWCA, 1270 kc/s; WTAQ, 1300 kc/s; WNUS, 1390 kc/s; WVON, 1450 kc/s; and WOPA, 1490 kc/s.

13. Of these eight, four are licensed to cities other than Chicago with two in northern Indiana cities. Of the remaining four, WNUS programs news only; WVON is wholly an ethnic station; and three share time stations are principally foreign language; and WIND is part of group Westinghouse. WMAQ, WBBM and WLS, are operated by NBC, CBS and ABC networks respectively; WCFL is operated by the Chicago Federation of Labor; and WGN is owned and operated by the Chicago Tribune, a daily newspaper. It thus appears that there is not now a single, locally owned and managed, entirely independent Chicago station authorized to operate at night which seeks to provide radio programs for the Chicago audience generally. If this petition is granted WAIT will be such a station.

[17]

14. In support of its last application for renewal of its broadcasting station license, FCC Form 303, filed on or about August 25, 1964, WAIT attached as Exhibit 2, "Other Broadcast Stations and Business Interests," a statement describing its owners and managers, and as Exhibit 3, a "Statement of the Philosophy and Objectives of WAIT's Programming Policies." Those statements are incorporated herein as though fully set forth and the Commission's attention is directed to them. In essence, WAIT seeks to sat-

isfy the wants of the adult audience in the Chicago area for mature music artfully programmed with a limited amount of talk and chatter, together with serious, in depth discussions of public affairs and educational matters programmed at times of the day and week when an adult audience in the Chicago area could listen to such serious-minded, mature programs.

15. The views of the management of WAIT Radio as to the appeal to Chicago radio listeners of this type of programming are confirmed by the available data as to listener preference. The most recently published Chicago radio audience estimates indicate that on the average more than 500,000 persons listen to WAIT each week. That is more than eight per cent of the total radio audience over ten years of age. Only three other Chicago stations are estimated to have larger audiences. Significantly, each operates full time. The fluctuating period of operation by WAIT, however, seriously interferes with the continuity of its services to meet the demands of this audience. Simultaneously, the competitive position of WAIT in relationship to the other major Chicago stations, is seriously handicapped. The audience which WAIT programming attracts during the summer months declines in the winter months and builds up again as WAIT is free to remain on the air for longer hours. There is no indication that WFAA/WBAP serves any of this audience when WAIT is off the air. It is clear, of course, that this audience has other night primary service available to it. But it is significant that a substantial portion of it returns to WAIT in the spring and summer time.

[18]

16. It is an axiom of the basic political and economical views of the United States that competition results in improved goods and services at lower prices. Radio service is no exception. Limitation, then, on competition in any area thwarts improvement in radio service. When the limitation exceeds that which may be desirable to enable increased service in another

area, the limitation contravenes basic American principles and is inviolation of both statutory and constitutional limitations on administrative action contained in the Communications Act and the Fifth Amendment to the Constitution of the United States, respectively.

17. The limitation involved here antedates the Communication Act as the Commission observed in its original Report and Order in Docket No. 6741. This does not justify its continuance. More important, the pattern of allocation which produces the limitation was designed prior to the development of the directional antenna. The present availability of that device with the possibilities shown here makes this limitation an anachronism. Actually, the Commission by granting this petition can both increase and improve primary service in the Chicago area and enable and protect sky-wave service to the "white" areas in the northwest.

18. The limitation of WAIT to daytime operation so seriously impairs its ability to communicate with its audience that WAIT is denied the freedom of speech protected by the First Amendment to the Constitution of the United States. It is as though, by governmental action, the Chicago Tribune, a morning paper, was prohibited from selling evening editions, or a magazine by administrative fiat was limited to newsstand sales with circulation by mail denied.

19. In this connection it should be noticed that evening, from about 6:30 p.m. to 11:00 p.m., local time, is the period when a mature, adult audience, through with its day's work, is at home able to listen to, and comprehend,

[19]

serious social, political and educational programs. WAIT is off the air for most of this period. Its facilities are not available, therefore, either commercially or as a public service, for such programs. For example, inquiries by, and discussions with, organizations such as the National Association

for the Advancement of Colored People (NAACP) and the American Civil Liberties Union, Chicago Division (ACLU) as to the availability of time on WAIT for programs of those groups have come to naught because of the limitation on the use of WAIT facilities. WAIT would be willing to provide its facilities for the use of such groups assuming that they would produce and present programs conforming to WAIT standards. Thus those groups and others are limited in their use of radio as a means of communication of their ideas. The limitation on WAIT, then, hampers those groups and others similarly situated in exercising rights protected by the First Amendment. In a metropolitan area like Chicago, with a variety of problems and a variety of views concerning them, it is obvious that public interest, as well as constitutional doctrine, dictates the widest possible use of all communication media. Any governmental limitation on the use of such a media, therefore, would raise First Amendment questions. Under the circumstances here where the limitation is shown to be greater than is necessary to serve its purpose the administrative action would appear to violate the First Amendment.

---



## FEDERAL COMMUNICATIONS COMMISSION

Section IV-A

STATEMENT OF AM OR FM PROGRAM SERVICE (See instructions in Sec. IV-A, page i and ii)	Name of Applicant <u>Maurice Rosenfield, Lois F. Rosenfield, Harold A. Weiss, Robert G. Weiss, and Devoe, Shadur, Mikva and Plotkin</u>
Call letters of station  <u>WAIT</u>	City and state which station is licensed to serve  <u>Chicago, Illinois</u>

## PART I

Ascertainment of Program Needs

1. A. State in Exhibit No. 5 the methods used by the applicant to ascertain the needs and interests of the public served by the station. Such information shall include (1) identification of representative groups, interests and organizations which were consulted and (2) the major communities or areas which applicant principally undertakes to serve.
- B. Describe in Exhibit No. 5 the significant needs and interests of the public which the applicant believes his station will serve during the coming license period, including those with respect to national and international matters.
- C. List in Exhibit No. 5 typical and illustrative programs or program series (excluding Entertainment and News) that applicant plans to broadcast during the coming license period to meet those needs and interests.

NOTE: Sufficient records shall be kept on file at the station, open for inspection by the Commission, for a period of 3 years from the date of filing of this statement (unless requested to be kept longer by the Commission) to support the representations required in answer to Question 1. These records should not be submitted with this application and need not be available for public inspection.

## PART II

Past Programming

2. A. State the total hours of operation during the composite week: 87.30
- B. Attach as Exhibit No. 10 the original or exact copies of program logs for the composite week used as a basis for responding to questions herein. Applicants utilizing automatic program logging devices must comply with the provisions of Sections 73.112(c) and 73.282(c). Original logs or automatic recordings will be returned.
- If applicant has not operated during all of the days of the composite week which would be applicable to the use of this form, applicant should so notify the Commission and request the designation of substitute day or days as required.
3. A. State the amount of time (rounded to the nearest minute) the applicant devoted in the composite week to the program types (see Definitions) listed below. Commercial matter within a program segment shall be excluded in computing time devoted to that particular program segment (e.g., a 15-minute news program containing 3 minutes' commercial matter shall be counted as a 12-minute news program).

	Hours	Minutes	% of Total Time on Air
(1) News .....	<u>9</u>	<u>45</u>	<u>10.39%</u>
(2) Public Affairs .....	<u>2</u>	<u>56</u>	<u>3.52%</u>
(3) All other programs, exclusive of Entertainment and Sports .....	<u>3</u>	<u>33</u>	<u>4.06%</u>

- B. If in the applicant's judgment the composite week does not adequately represent the station's past programming, applicant may in addition provide in Exhibit No. \_\_\_\_\_ the same information as required in 3-A above (using the same format) for a calendar month or longer during the year preceding the filing of this application. Applicant shall identify the time period used. Applicant need not file the program logs used in responding to this question unless requested by the Commission.
4. List in Exhibit No. 5 typical and illustrative programs or program series (excluding Entertainment and News) broadcast during the year preceding the filing of this application which have served public needs and interests in applicant's judgment. Denote, by underlining the Title, those programs, if any, designed to inform the public on local, national or international problems of greatest public importance in the community served by the applicant. Use the format below.
- | Title | Source* | Type* | Brief Description | Time Broadcast & Duration | How Often Broadcast |
|-------|---------|-------|-------------------|---------------------------|---------------------|
|-------|---------|-------|-------------------|---------------------------|---------------------|
5. Submit in Exhibit No. 5 the following information concerning the applicant's news programs:
- A. The staff, news gathering facilities, news services and other sources utilized; and
- B. An estimate of the percentage of news program time devoted to local and regional news during the composite week.
6. In connection with the applicant's public affairs programming, describe its policy during the past renewal period with respect to making time available for the discussion of public issues and the method of selecting subjects and participants.

See Exhibit No. 5

\*See Definitions

## STATEMENT OF AM OR FM PROGRAM SERVICE

Section IV-A, Page 2

7. Describe briefly the applicant's program format(s) during the past 12 months (e.g., country and western music, talk, folk music, classical music, foreign language, jazz, standard pops, etc.) and the approximate percentage of time per week devoted to such format(s).

See Exhibit No. 5

8. State how and to what extent (if any) applicant's station contributed during the past license period to the over-all diversity of program services available in the area or communities served.

See Exhibit No. 5

9. Was the applicant affiliated with one or more national, regional or special radio networks during the past license period?  
Yes \_\_\_\_\_ No X. If "yes," give name(s) of network(s): \_\_\_\_\_

10. State the number of public service announcements broadcast by the applicant during the composite week: 151

11. A. If this application is for an FM station, did the programming duplicate that of any AM station?  
Yes \_\_\_\_\_ No \_\_\_\_\_. ("Duplicate" means simultaneous broadcasting of a particular program over both the AM and FM stations or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station—Section 73.242(a) of the Rules and Regulations.)  
B. If the answer is "yes," identify the AM station by call letters; describe its relation to the FM station; and state the number of hours each day in the composite week that were duplicated.

12. A. In applicant's judgment, does the information supplied in this Part II adequately reflect its past programming?  
Yes \_\_\_\_\_ No \_\_\_\_\_.  
B. If "no," applicant may attach as Exhibit No. 5 such additional information as may be necessary to describe accurately and present fairly its program service.  
C. If applicant's programming practices for the period covered by this statement varied substantially from the programming representations made in applicant's last renewal application, the applicant shall submit as Exhibit No. \_\_\_\_\_ a statement explaining the variations and the reasons therefor.

## PART III

## Proposed Programming

13. State the proposed total hours of operation during a typical week: 140  
14. State the minimum amount of time the applicant proposes to devote normally each week to the program types (see Definitions) listed below. Commercial matter within a program segment shall be excluded in computing time devoted to that particular program segment (e.g., a fifteen-minute news program containing 3 minutes' commercial matter shall be computed as a 12-minute news program.)

	Hours	Minutes	% of Total Time on Air
(1) News.....	<u>14</u>	<u>      </u>	<u>10</u> %
(2) Public Affairs .....	<u>7</u>	<u>      </u>	<u>5</u> %
(3) All other programs, exclusive of Entertainment and Sports.....	<u>5</u>	<u>45</u>	<u>4</u> %

15. Submit in Exhibit No. 5 the following information concerning the applicant's proposed news programs:  
A. The staff, news gathering facilities, news services and other sources to be utilized; and  
B. An estimate of the percentage of news program time to be devoted to local and regional news during a typical week.



## STATEMENT OF AM OR FM PROGRAM SERVICE

Section IV-A, Page 3

16. In connection with the applicant's proposed public affairs programming describe its policy with respect to making time available for the discussion of public issues and the method of selecting subjects and participants.

See Exhibit No. 5

17. Describe the applicant's proposed programming format(s), e.g., country and western music, talk, folk music, classical music, foreign language, jazz, standard pops, etc., and the approximate percentage of time per week to be devoted to such format(s).

See Exhibit No. 5

18. State how and to what extent (if any) applicant proposes to contribute to the over-all diversity of program services available in the area or communities to be served.

See Exhibit No. 5

19. State the minimum number of public service announcements applicant proposes to present during a typical week: 175

20. Will the applicant be affiliated with one or more national, regional, or special radio networks? Yes \_\_\_\_\_ No X  
If "yes," give name(s) of network(s): \_\_\_\_\_

21. A. If this application is for an FM station will the programming duplicate that of any AM station? Yes \_\_\_\_\_ No \_\_\_\_\_  
("Duplicate" means simultaneous broadcasting of a particular program over both AM and FM stations or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station—Section 73.242(a) of the Rules and Regulations.)  
B. If the answer is "yes," identify the AM station by call letters; describe its relation to the FM station; and state the number of hours each day proposed to be duplicated.

## PART IV

Post Commercial Practices

22. Give the following information with respect to the composite week:

	<u>All Hours</u>	<u>6 A.M. - 6 P.M.</u>
A. Total broadcast time .....	<u>87.30</u>	<u>79.45</u>
B. Time devoted to commercial matter:		
(1) Amount in hours and minutes .....	<u>16.43</u>	<u>15.27</u>
(2) Percentage .....	<u>19.18</u> %	<u>19.37</u> %

## STATEMENT OF AM OR FM PROGRAM SERVICE

Section IV-A, Page 4

23. State the number of 60-minute segments of the composite week (beginning with the first full clock hour and ending with the last clock hour of each broadcast day) containing the following amounts of commercial matter:

A. Up to and including 10 minutes .....	32
B. Over 10 and up to and including 14 minutes .....	40
C. Over 14 and up to and including 18 minutes .....	11
D. Over 18 minutes .....	0

List each segment in category (D) above, specifying the amount of commercial time in the segment, and the day and time broadcast.

24. A. In the applicant's judgment, does the information supplied in this Part IV for the composite week adequately reflect its commercial practices? Yes \_\_\_\_\_ No X \_\_\_\_\_.
- B. If "no," applicant may attach as Exhibit No. 5 such additional material as may be necessary to describe adequately and present fairly its commercial practices.
- C. If applicant's commercial practices for the period covered by this statement varied substantially from the commercial representations made in applicant's last renewal application, the applicant shall submit as Exhibit No. \_\_\_\_\_ a statement explaining the variations and the reasons therefor.

## PART V

Proposed Commercial Practices

25. State the maximum percentage of commercial matter which the applicant proposes normally to allow during the following segments of a typical week:

6 a.m. - 6 p.m. \_\_\_\_\_ 30 %

All hours \_\_\_\_\_ 30 %

If applicant proposes to permit this level to be exceeded at times, state under what circumstances and how often this is expected to occur, and the limits that would then apply.

In emergencies -- such as a jam-up or conflict of commitments in the aftermath of a suspension of sharp curtailment of commercial time to pre-empt time for special emergency programs or features or like emergencies. Such situations are expected to occur infrequently, to last but a few days at most and to require a margin of up to three additional minutes in isolated portions of the broadcast day such as particular morning or late afternoon drive-time hours.

26. What is the maximum amount of commercial matter in any 60-minute segment which the applicant proposes normally to allow? 18 minutes.

If applicant proposes to permit this amount to be exceeded at times, state under what circumstances and how often this is expected to occur, and the limits that would then apply.

See paragraph 25 above.

## STATEMENT OF AM OR FM PROGRAM SERVICE

Section IV-A, Page 5

## PART VI

General Station Policies and Procedures

27. State the name(s) and position of the person(s) who determines the day-to-day programming decisions and directs the operation of the station covered by this application and whether he is employed full-time in the operation of the station.

Maurice Rosenfield	Managing Partner and Executive Director Not Full Time
Fred Harm	General Manager - Full Time
John Doremus	Administrative Assistant to Executive Director - Full Time
Joseph Lacina	Operations Manager - Full Time
Ralph Rowland	News Director - Full Time
Corinne Caldarazzo	Music Librarian - Full Time
Jessie Grigsby	Program and Traffic Coordinator Full Time
Harry Berg	Chief Engineer - Full Time

28. A. Does the applicant have established policies with respect to programming and advertising standards (whether developed by the station or contained in a code of broadcasting standards and practices) to guide the operation of the station?

Yes X No \_\_\_\_\_

- B. If "yes," attach as Exhibit No. 5 a brief summary of such policies. (If the station relies exclusively upon the published code of any national organization or trade association, a statement to that effect will suffice)

29. State the methods by which applicant undertakes to keep informed of the requirements of the Communications Act and the Commission's Rules and Regulations, and a description of the procedures established to acquaint applicant's employees and agents with such requirements and to ensure their compliance.

The managing partner of applicant, its counsel, and its engineering consultants all keep informed of legislative and administrative action. By both staff conferences and written directions and memoranda applicant's employees and agents are informed of requirements. Subsequent direct inquiry is made by the managing partner and the general manager to assure compliance with directions given.

30. If, as an integral part of its station identification announcements, applicant makes or proposes to make reference to any business, profession or activity other than broadcasting in which applicant or any affiliate or stockholder is engaged or financially interested, directly or indirectly, set forth typical examples and approximate frequency of their use.

No such practice is contemplated.

31. State the number of station employees: 22. If the station has or proposes to have ten or more employees, state in Exhibit No. 5 the number of full-time and part-time employees in the programming, sales, technical, and general and administrative departments. Do not list the same employee in more than one category. However, if an employee performs multiple services, this may be so shown by identifying him with his various duties e.g., if two employees are combination announcers and salesmen, the list would include an entry of "two programming and salesmen."

## STATEMENT OF AM OR FM PROGRAM SERVICE

Section IV-A, Page 6

## PART VII

## Other Matters and Certification

32. Applicant may submit as Exhibit No. 5 any additional information which, in its judgment, is necessary adequately to describe or to present fairly its services and operations in relation to the public interest.
33. The undersigned has familiarized himself with paragraph 7 of page i of the Instructions to Section IV-A concerning signature requirements and in light of its provisions does hereby:
- Acknowledge that all the statements made in this Section IV-A and the attached exhibits are considered material representations and that all the exhibits are a material part hereof and are incorporated herein as if set out in full in the application form; and
  - Certify that the statements herein are true, complete, and correct to the best of his knowledge and belief and are made in good faith.

SIGNED AND DATED this 10th day of February, 1967 MAURICE ROSENFIELD, LOIS F. ROSENFIELD, HOWARD A. WEISS, ROBERT G. WEISS, and DeVOE, SHADUR, MIKVA and PLOTKIN, a co-partnership, d/b/a WAIT RADIO  
(NAME OF APPLICANT)

By: \_\_\_\_\_

(SIGNATURE)

MAURICE ROSENFIELD

(PLEASE PRINT NAME OF PERSON SIGNING)

Managing Partner

(TITLE)

WILLFUL FALSE STATEMENTS MADE IN THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT. U. S. CODE, TITLE 18, SECTION 1001.

ATTACHMENT A

Attention is invited to the Commission's "Report and Statement of Policy Re: Commission En Banc Programming Inquiry" released July 29, 1960 - FCC 60-970 (25 Federal Register 7291; 20 Pike and Fischer Radio Regulation 1902).

Pursuant to the Communications Act of 1934, as amended, the Commission cannot grant, renew or modify a broadcast authorization unless it makes an affirmative finding that the operation of the station, as proposed, will serve the public interest, convenience and necessity. Programming is of the essence of broadcasting.

A broadcast station's use of a channel for the period authorized is premised on its serving the public. Thus, the public has a legitimate and continuing interest in the program service offered by the station, and it is the duty of all broadcast permittees and licensees to serve as trustees for the public in the operation of their stations. Broadcast permittees and licensees must make positive, diligent and continuing efforts to provide a program schedule designed to serve the needs and interests of the public in the areas to which they transmit an acceptable signal.

In its above-referenced "Policy Statement," the Commission has indicated the general nature of the inquiry which should be made in the planning and devising of a program schedule:

"Thus we do not intend to guide the licensee along the path of programming; on the contrary, the licensee must find his own path with the guidance of those whom his signal is to serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest. What we propose will not be served by pre-planned program format submissions accompanied by complimentary references from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life — public officials, educators, religious (groups), the entertainment media — agriculture, business, labor, professional and eleemosynary organizations, and others who bespeak the interests which make up the community."

Over the years, experience has shown both broadcasters and the Commission that certain recognized elements of broadcast service have frequently been found necessary or desirable to serve the broadcast needs and interests of many communities. In the Policy Statement, referred to above, the Commission set out fourteen such elements. The Commission stated:

"The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming."

It is emphasized that broadcasters, mindful of the public interest, must assume and discharge responsibility for planning, selecting and supervising all matter broadcast by their stations, whether such matter is produced by them or provided by networks or others. This duty was made clear in the Commission's Policy Statement, page 14, paragraph 3:

"Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide (an) acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This, again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others."

EXHIBIT 5  
WAIT Form 301  
February 10, 1967



In light of Instruction 4 as to Form 301, it appears that applicant may not now be required for an application such as this one to complete Section IV-A of Form 301. Applicant's programming practices, past and proposed, are described in general terms below, however, as well as in Exhibit 1 hereto, and in Exhibits 3 to 9 inclusive of WAIT's Application for Renewal of Broadcast Station License, August 25, 1964, as amended by report to the FCC dated March 9, 1966, which are included herein by reference.

#### EVALUATION OF LOCAL NEEDS

As indicated in said Exhibit 3 to the License Renewal Application, incorporated here as aforesaid, WAIT is 100% locally owned. Most of its partners are life long residents of the area. The managing partner is a life long resident of the Chicago area. He was educated in the Chicago Public Schools and the University of Chicago, and has practiced law in Chicago for a number of years. He was the owner and operator of an active FM station in Chicago from 1957 to 1966, and has been the managing partner of WAIT since 1962. Howard A. Weiss is a graduate of the U.S. Naval Academy and Harvard Law School, and his brother, Robert, attended Northwestern University in Chicago, Illinois. Each of the partners involved has been active in the business, professional, civic and social life of the Chicago area for many years. Each of these partners, through their innumerable contacts with literally hundreds of Chicago area residents, has contributed to the programming judgments of WAIT. Both of the Weisses are directors and Robert is Treasurer of the Weiss



Memorial Hospital, a leading Chicago eleemosynary institution established through a gift from their family. Their activity and interest on a large scale in the hospital affairs keeps them in close touch with the public and social agencies in the health and welfare fields in Chicago.

WAIT maintains a Community Service Department, one of whose principal functions is to establish close working cooperative arrangements with all community organizations, public departments, social service and public welfare bodies and agencies. Representative agencies and bodies of this type with whom WAIT has established working arrangements are listed in the exhibits to our license renewal, which as noted above has been incorporated herein. Our Community Services Department has solicited the views of some 800 community organizations and welfare bodies and agencies with respect to our programming policies and objectives, and our objective is to establish on-going dialogue with them on Chicago radio programming. We have also inquired of and discussed our programming content and philosophies and objectives with the Mayor of the City of Chicago and other public officials, leading trade unionists, the radio and TV specialists at the University of Chicago, with whom we maintain close cooperative arrangements, and Northwestern University, and with the Radio-TV Department of the Chicago Archdiocese, the Church Federation of Greater Chicago, and the Chicago Rabbinical Association, and leading organizations such as the NAACP and the ACLU. The Executive Director of the station reads all incoming mail with respect to programming content, philosophies and objectives and closely supervises himself the work of the Community Services Department and their response to calls and correspondence from the audience as well as the social agencies referred to.

Specific aspects of programming, such as news, have been discussed with leading journalists, including newspaper editors, and outside news specialists, such as the late Ben Hecht. Particular emphasis has been given to discussions concerning weather reporting. The Executive Director has discussed weather coverage extensively with the Chief Meteorologist at the U. S. Weather Bureau at Chicago. He discovered that a group of scientists, principally chemists and biologists, most of them with Ph.D.'s from leading universities, employed at the G. D. Searle Laboratory near Chicago, had formed an amateur meteorological club and were actively studying weather forecasting and observing and comparing weather coverage in news media, and at least one local municipal body - the City of Park Ridge, Illinois - had a special interest in weather reporting. He met and corresponded with the chairman and members of the Searle Club and with the officials of Park Ridge, treating these bodies as responsible and thoughtful representative groups for extended dialogue on this subject. Emphasis on improved weather coverage as a result is a significant feature of Radio WAIT's programming.

Similar dialogues have occurred with respect to hourly stock market reports, which also have become a feature of WAIT's news coverage. In connection with this feature, the opinion of the audience itself was solicited through announcements over the air over a two-day period requesting listeners to express their opinions as to whether or not this was an important and useful news feature. Approximately 10,000 letters from listeners requested the continuance of this feature and it has been maintained largely on a sustaining basis.

As pointed out in the exhibits to our license renewal application which have been incorporated herein, we have concluded that the radio audience in

**BEST COPY AVAILABLE**

from the original bound volume



Chicago is a composite of individuals with many tastes and needs with each group of such individuals constituting in itself a minority. From a careful examination of the programming of the television, AM and FM stations serving Chicago, and by an equally careful consideration of the multiplicity of tastes and needs in the Chicago area and as a result of our inquiries and investigations, applicant concluded that the greatest unsatisfied local need on the AM dial in Chicago under current conditions was for fine music programming and basically adult appeal, plus news and other informational programming which would appeal to the same type of adult audience.

The following tabulation of the general programming concepts of all Chicago AM licenses will bring up to date the analysis of comparative programming found in the aforesaid incorporated exhibits to our license application.

<u>STATION</u>	<u>FREQUENCY &amp; FACILITY</u>	<u>OWNERSHIP &amp; AFFILIATION</u>	<u>GENERAL NATURE OF ENTERTAINMENT PROGRAMMING</u>
WIND	560 kc - 5 kw; fulltime	Westinghouse owned and operated.	Popular music, principally, top-40.
WMAQ	670 kc-- 50 kw;	NBC owned and operated.	Chicago White Sox and other sports play-by- play; variety; NBC weekend Monitor and other NBC features. Experimented with rock and roll; has reverted to middle of the road music insofar as it programs music.

42

WGN	720 kc - 50 kw; fulltime	Chicago Tribune owned and operated.	Chicago Cubs, Chicago Bears and other play-by- play sports; comedy and variety; variety in music programming insofar as it programs music (with some better music content).
WBBM	780 kc - 50 kw; fulltime	CBS owned and operated.	Main emphasis on "all talk", and "open mike".
WAIT	820 kc - 5 kw; daytime.	Independent locally owned.	Good music exclusively.
WLS	890 kc - 5 kw; fulltime.	ABC owned operated.	Primarily rock and roll.
WAAF	950 kc - 1 kw;	Currently identified with farm newspaper owners. Application pending for transfer to independent local group.	Principally Negro ethnic.
WCFL	1000 kc -	Chicago Federation of Labor owned and operated.	Formerly sports play-by- play; recently changed to rock and roll.

43

WSBC	1240 kc -	Independent	Foreign language.
WCRW	250 w or	locally	
WEDC	1 kw;	owned.	
	three		
	stations		
	sharing		
	time.		
WMBI	1110 kc -	Moody Bible	Evangelist.
	5 kw;	Institute	
	daytime.		
WJJD	1160 kc -	Plough	Country and Western.
	50 kw;	Broadcasting	
	daytime.	owned and	
		operated.	
WNUS	1390 kc -	McLendon	All news.
	5 kw;	Group	
	fulltime.		

This comparative analysis reveals three significant and astonishing conclusions:

1. WAIT is the only AM licensee in Chicago featuring good music for adults as its dominant entertainment concept.

2. Chicago, though the second largest city in America, appears to be unique among all large cities in lacking a fulltime AM station with good music for adults as its dominant programming concept.

3. Chicago has a striking paucity of independent and locally owned and operated stations such as WAIT.

NON-ENTERTAINMENT PROGRAMMING

Among the typical and illustrative program series, excluding entertainment, which WAIT broadcasts and plans to meet these needs and interests are as follows:

a) SPECIAL WEATHER INFORMATION:

For the past several years the Chicago area has been plagued with recurring tornados and other severe weather threats. Most recently the area was immobilized by record snowfalls. At times the reaction of the community to these severe weather warnings has bordered on hysteria. Failure of early warning as to the probable extent of the recent record snowfall contributed to the stalling of thousands of motor vehicles all over the area. Some subsequent snow forecasts were exaggerated in an effort to avoid repetition of this. This produced a jamming of public transportation facilities.

About two years ago, WAIT began to explore techniques for broadcasting both weather warnings and information as to the cessation of weather threats in the Chicago area. To facilitate carrying on these programs WAIT engaged a private meteorological firm, at substantial expense, to collate and to make available to WAIT, for immediate broadcast, all available meteorological data, including that from government sources.

As a result of the special efforts of WAIT in this connection, its weather services receive substantial public recognition. As an example, there is attached hereto and made a part hereof, correspondence between the City

of Park Ridge, a suburb of Chicago, and WAIT marked Exhibit 6. Effective utilization of this weather service, however, requires WAIT to operate around the clock.

b) UNIVERSITY OF CHICAGO PROGRAMS:

For some time, WAIT, in conjunction with the University of Chicago, has broadcast two series; one titled, "Midway" and the other "Paperback".

The "Midway" series consisted of a regular weekly discussion by members of the faculty of the University of Chicago and visitors to the university on topics of current academic interest, ranging from economic analysis to critiques of American foreign policy.

The "Paperback" series, as its name suggests, consisted of a series of reviews by university faculty members, of books published and sold at low price. It has recently been discontinued and WAIT has been engaged in working out with the Office of Radio and Television of the University of Chicago a substitute program designed to provide discussion of important current public issues by faculty members of that university. It is intended that this series would be taped and made available to other stations on a syndicated basis. Temporarily, this series bears the name "Perspective".

c) PROBLEMS OF THE CITY:

For several years, under the direction of Prof. John E. Coons of the Law School of Northwestern University, WAIT has produced and broadcast a series of in-depth reports, characterized by multiple programs on the

46

same topic as required to provide exhaustive discussions and inquiries on current problems and issues in the Chicago area. Participants have been leading Chicago area residents selected for their particular knowledge of, and interest in, the topics covered. Among those topics and typical of them have been:

1. Racial segregation in Chicago public schools.
2. Quality of public education in Chicago and its suburbs.
3. Administration of criminal law in Cook County.
4. Obscenity in books, periodicals, plays and reviews.
5. Church, state and school.
6. Birth control.

A list of such programs carried in 1966 is attached hereto marked Exhibit No. 7.

d) NEWS PROGRAMMING:

For some time WAIT has been endeavoring to improve its news coverage at both ends of the spectrum. In addition to its hourly five minute newscasts WAIT follows a frequently announced policy that "When the news breaks out WAIT breaks in." In addition, at regular intervals during the day while the stock markets are open, as well as at the closing, market quotations are broadcast. Similarly, scores of athletic contests are broadcast at intervals as games proceed as well as at the end of the games. In view of the necessary summary character of radio reporting WAIT listeners are frequently urged in its newscasts to read regularly one or more of the five Chicago newspapers for more detailed news reports.

In an effort to test its ability at reporting in depth WAIT intensively investigated the facts

47

of recent federal court litigation brought by an Illinoisan who charged that he had wrongfully been convicted of the rape-murder of a child and sentenced to death by a state court. As a result of the WAIT investigation new evidence was uncovered which showed the defendant to be innocent. On the basis of that evidence, WAIT together with the American Civil Liberties Union, appeared as amicus curiae in the Supreme Court of the United States to urge that the defendant's conviction be set aside and a copy of the brief amicus is attached hereto marked Exhibit 8. On February 13, 1967, the Supreme Court ordered the conviction set aside. Attached hereto marked Exhibit 9 are copies of Chicago newspaper comment as to WAIT's participation.

Approval of this application would enable WAIT to devote more broadcasting time and additional staff effort to development of these and other programs designed to meet the needs and satisfy the desires of a large part of the adult Chicago radio audience.

e) OTHER COMMUNITY SERVICES:

In lieu of disc-jockey chatter, generally we feature in our programming items of significant community interest, such as a brief book notice and book reviews, movie notices and reviews, guides to concerts and cultural attractions, leading restaurants and places of interest, historical notes about the city and area, quotations "to think about," etc. Another feature of this nature we refer to as "In Your Neighborhood." It involves the billboarding and recognition of specific events or projects of various neighborhood organizations, churches and welfare groups, such as open houses, fashion shows, carnivals, book



sales, concerts, festivals, reunions, fairs, etc. Finally, we carry two daily features known respectively as "Businessman of the Day" and "Lady of the Day". A local businessman deserving of community recognition for some civic contribution or other distinction is selected and honored daily. Likewise, a woman deserving of recognition for her contribution to the cultural, civic or welfare work of the community is also selected and honored daily. The names of the recipients and the reasons are presented several times each day and they are sent merit certificates from the station.

The information on which "In Your Neighborhood" is based, and nominations for "Businessman of the Day" and "Lady of the Day" come from a wide variety of civic and business organizations and individuals connected with those organizations. Inevitably many of those organizations and individuals comment to WAIT with respect to WAIT programming and WAIT both solicits and considers those comments, whether volunteered or solicited, in determining program policies.

f) TRAFFIC REPORTS:

During morning and afternoon drive time, WAIT, at frequent intervals, provides detailed traffic information principally compiled from material transmitted to it from more than forty (40) traffic observers using motor vehicles equipped with two-way radios. Particularly when weather conditions, traffic conditions or accidents impede the normal flow of Chicago rush hour traffic via expressways, arterial highways and streets, these reports are relied upon by motorists to facilitate their transportation.

Experience with traffic reporting demonstrates that on-the-ground observations of traffic conditions

when available, are substantially superior to reports from air observation, even from helicopters. WAIT is the only Chicago AM radio station using extensive ground observation as the chief basis for its traffic reports. The daytime limitation of WAIT's operation, however, severely handicaps the utilization of this service to WAIT listeners particularly during the winter months when it is most likely to be needed.

#### PAST PROGRAMMING

In the composite week in 1966 WAIT operated for a total of 87.30 hours. Of that total, 9 hours and 45 minutes or 10.39% were devoted to "News"; 2 hours and 56 minutes or 3.52% were devoted to "Public Affairs"; and 3 hours and 33 minutes or 4.06% were devoted to all other programs exclusive of "Entertainment and Sports". During the composite week WAIT broadcast 151 public service announcements.

Applicant is not now, never has been, and does not propose to become, affiliated with any national, regional or special radio network.

#### PROPOSED PROGRAMMING

If this application is granted, WAIT proposes to operate for 140 hours per week. Of that total 14 hours or 10% will be devoted to "News"; 7 hours or 5% will be devoted to "Public Affairs"; and 5 hours and 45 minutes or 4% will be devoted to all other programs, exclusive of "Entertainment and Sports". A minimum of 175 public service announcements will be made during a typical week.

#### PAST COMMERCIAL PRACTICES

During the composite week total broadcast of 87.30 hours, 79.45 hours were between 6:00 A.M. and 6:00 P.M. Of the total 16 hours and 43 minutes or 19.18% were

devoted to commercial matter. Between 6:00 A.M. and 6:00 P.M. 15 hours and 27 minutes of 19.37% were devoted to commercial matter. Thirty-two 60 minute segments contained commercial matter up to and including 10 minutes; 40 such segments contained such matter over 10 minutes but less than 15 minutes; 11 such segments contained such matter over 14 minutes but less than 19 minutes; no segment contained commercial matter over 18 minutes.

Basic to its commercial practices WAIT carefully scrutinizes its advertisers and their products, and continuously monitors and reviews their advertising material to assure that their goods and services are compatible with the tastes and desires of WAIT's audience and that their commercial material is consistent with the high tone of WAIT's general programming. Put simply, WAIT refuses to permit its facilities to be used for a "hard sell" or by purveyors of goods or services of questionable quality and reliability. In addition, WAIT sharply limits the time which may be devoted to any individual commercial.

#### PROPOSED COMMERCIAL PRACTICES

If this application is approved WAIT will allow a maximum percentage of 30% to commercial matter during all hours. This percentage may have to be exceeded for a few days at a time and for perhaps three or four additional minutes per day in isolated portions of the broadcast day such as morning or late afternoon drive-time hours if there has been a suspension or sharp curtailment of commercial time to pre-empt time for special emergency programs or features. Normally, however, WAIT will not allow more than 18 minutes in any 60 minute segment to be devoted to commercial matter.

GENERAL STATION POLICIES & PROCEDURES

WAIT presently has twenty-two employees. Of these, seven are in programming, three are in sales, four are in the technical department and eight are engaged in general administration. Only two of these employees are part-time.

Day-to-day programming decisions and direction of station operation are provided by the following:

Maurice Rosenfield	Managing Partner and Executive Director
John Doremus	Adm. Asst. to Exec. Director
Joseph Lacina	Operations Manager
Ralph Rowland	News Director
Corinne Caldarazzo	Music Librarian
Jessie Grigsby	Program and Traffic Coordinator
Harry Berg	Chief Engineer

To assure that WAIT keeps informed of the requirements of the Communications Act and the Commission's Rules and Regulations the managing partner of applicant, its counsel, and its engineering consultants all keep informed of legislative and administrative action. By both staff conferences and written directions and memoranda applicant's employees and agents are informed of requirements. Subsequent direct inquiry is made by the managing partner and the general manager to assure compliance with directions given.

WAIT does not now make, never has made, and does not propose to make, any reference in its station identification announcements to any business, profession or activity in which applicant, any of its owners or affiliates are engaged.

EXHIBIT 6  
WAIT Form 301  
February 10, 1967

CITY OF PARK RIDGE  
State of Illinois

Office of Mayor  
City Hall

July 11, 1966

Mr. Maurice Rosenfield  
Radio Station WAIT  
188 W. Randolph Street  
Chicago, Illinois

Dear Mr. Rosenfield:

For some time now I have been impressed with the wonderful weather information that you have been broadcasting. Recently I was driving in from Champaign and heard your weather alerts and immediately started to check other Chicago stations and found that you were way ahead of them in your alert to the people; it seemed longer than the forty minutes that you claim; it certainly was a fine demonstration of the excellence of your private weather reporting service.

Our Civil Defense people, our Elementary School people, our High School people, and the staff at the City Hall have been very concerned about the change in the weather disaster seeming to move up our way for some time now. We have been exploring the steps we should take to alert our schools, churches, business establishments and offices of these coming tornadoes.

After listening to your fine report it occurred to me that the perfect answer to our problem of alerting our people of coming danger was your Radio Station. As I thought the matter through it occurred to me that there are a few things that we would require from you. . .

1st - Of course a continuation of this excellent private weather reporting service.

2nd - From you, I would like to suggest a more significant danger alert, a siren or whistle or bell, which would surely divert

someone's attention from your beautiful music to the danger at hand.

At our end, of course, would be required a directive from the Mayor or City Manager to the Civil Defense people, the Police Department, the Fire Department, the School Boards and the Chamber of Commerce to tune in to your station to receive these alerts. I frankly would prefer small radios set on your signal, incapable of movement to another station.

I have gained enough confidence over the past year on your weather reports to suggest that we would be willing to try total dependence for the next twelve months on this early warning system that you subscribe to. In order to satisfy my department heads could I suggest a meeting between us for a further discussion of this program. My hours are hit-and-miss during the week and all day on Saturday. We could meet as early as 8 o'clock Saturday morning July 16, 1966 at my office. I shall have an important meeting on at 9 A.M. We could meet at 10 o'clock at my office or perhaps as late as 12 o'clock, if you wanted to lunch at the Pantry and talk over our problems.

At this stage of the game, Saturday the 23rd is wide open up until 1 o'clock. You can set a date merely by calling my secretary, Mrs. Marie Thomas, who has full control of my calendar.

[53]

I understand you would bring your general manager, Mr. Fred Harm, to this meeting. The participants from our staff would be City Manager, James L. Galloway, Civil Defense Director, Norman A. Brown, School Board representative, Mr. Russell Miller.

May I hear from you.

Very truly yours,  
/s/ W. Bert Ball  
Mayor

WBB/mst

cc to: City Manager  
Civil Defense Director  
School Board Representative



## CITY OF PARK RIDGE

STATE OF ILLINOIS

OFFICE OF MAYOR  
CITY HALL

July 25, 1966  
(Dic. 7/23/66)

Gentlemen:

This morning the Director of Civil Defense, Chief Norman A. Brown, and myself met with the owner and general manager of Radio Station WAIT in Chicago. Mr. Russell Miller of the Elementary School District also met with us.

They have contracted for the services of an unusually competent commercial weather reporting service who greatly augment the reports of the U. S. Weather Bureau, make them more current and a great deal more meaningful to our geographic area. They have been able to alert some of us with an early warning system that would be meaningful to every one of you in the safe handling of your children and your charges. The instant that they receive a weather alert of an approaching tornado, for instance, they break into the program with this information. By listening to this station we would all have the advantage of this weather service without paying the considerable fees for same.

Radio Station WAIT executives will investigate and develop a possible program for small radios available at a reasonable cost to us with single station ability only. These small radios could be kept on during their broadcast hours close to your switchboard, your receptionist, your desk operators, or your personnel charged with the responsibility of receiving and disseminating this information. The moment that these radios are available I will transmit to you their cost.

In the meantime, may I suggest that small AM radios turned to Station WAIT, 820 on the dial, be made available to your key personnel so that you may observe first hand the excellence of this program. In this manner you will be prepared some time after Labor Day to attend a general meeting at my office on this subject.

May I have your comments in the meantime.

Very truly yours,

*W. Bert Ball*  
W. Bert Ball  
Mayor

WBB/mst

cc to: Dr. Richard R. Short, Supt. Dis. 207  
Mr. Russell D. Miller, Secty., Dis. 64  
Chief of Police C. F. Christensen  
Fire Chief Norman A. Brown  
Mr. T. Jacobsen, Administrator Lutheran General Hospital  
Mr. Maurice Rosenfield, Radio Station WAIT  
Msgr. J. Duffin, St. Paul of the Cross Church  
Fr. E. M. Dowling, Mary Seat of Wisdom Church  
Rev. Paul Mehl, St. Andrew's Lutheran Church  
City Manager James L. Galloway



## LUTHERAN GENERAL HOSPITAL

CITY OF PARK RIDGE  
ILLINOIS  
RECEIVED

JUL 29 1966

AM

PM

7 8 9 10 11 12 1 2 3 4 5 6

July 28, 1966

T. L. Jacobsen  
Executive Vice PresidentW. Bert Ball  
Mayor  
City of Park Ridge  
Park Ridge, Illinois

Dear Mayor Ball:

I received your letter regarding the early warning system for adverse weather conditions.

This early weather warning is important information for us to know inasmuch as we may be called upon for meeting the needs of the community for emergency care in the event of a tornado, and also inasmuch as we can have advance warning on the possibility of power failure in the event of such a storm.

I am circulating your letter to our Disaster Committee and we will be placing a small radio at our switchboard as well as having one in the administrative offices where we can follow these reports.

I shall be happy to meet with you after Labor Day at the general meeting regarding this subject that you have proposed.

Sincerely yours,

T. L. Jacobsen  
Executive Vice President

## WAIT/820 - THE WORLD'S MOST BEAUTIFUL MUSIC

188 West Randolph Street - Chicago, Illinois 60601

August 3, 1966

Mr. W. Bert Ball  
Mayor  
City of Park Ridge  
505 Park Place  
Park Ridge, Illinois

My dear Mayor Ball:

This letter follows up the meeting on Saturday, July 23, between Mr. Harm and myself of WAIT and you and officials of the City of Park Ridge, as well as your recent memoranda and letters to us.

As discussed at our meeting, we have been investigating into the possibilities of utilizing special receiving equipment for installation at key Park Ridge area facilities whereby reception from WAIT would be automatically amplified at the receiving points when tornado watches and warnings are broadcast or other severe weather conditions occur. We should be ready for a followup meeting with you within the next week or ten days, at your convenience.

I can't exaggerate how delighted we are at the opportunity you have opened up for us to enlarge our community services. We view weather coverage as a unique service of broadcasting. Newspaper weather forecasts, for instance, may be out of date before they reach print or may be obsoleted by rapidly changing circumstances. Television, as compared with radio, is not as facile in cutting in immediately with important weather information. Also, radio is far more accessible to most people especially during early morning, daytime and late afternoon hours. For these reasons, we have been working hard for about a year, as you know, towards improved and responsible weather coverage. I believe it's not too much to say that we devote more

effort on weather, especially on the part of management, than any other station. We were experimenting with our private

[57]

service for about nine months and daily checking and comparing their reports with others before we were sure enough of our ground to publicize our special weather coverage over the air.

In this connection, at the meeting in your office, we discussed that day in May when torrential rainfall in the Chicago area produced flood conditions. I thought you might be interested in the enclosed interchange of correspondence between ourselves and the United States Weather Bureau in connection with that episode.

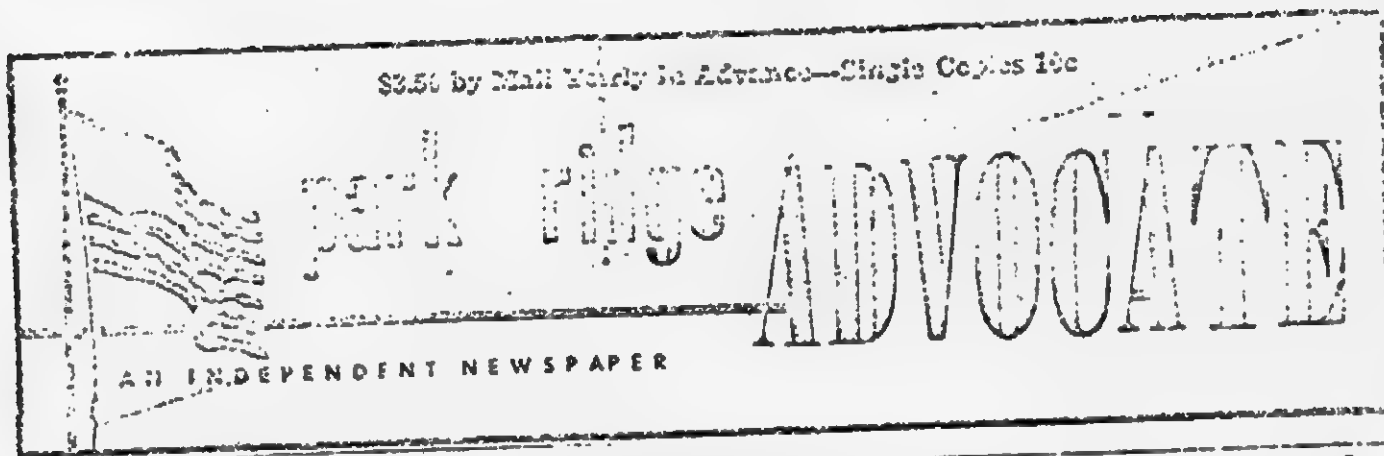
Again, be assured of our thanks to you and of our willingness to assist your community to our fullest potential. Also, I cannot refrain from expressing our admiration of your efforts to serve the people of Park Ridge with better weather and disaster warning and related services.

Sincerely,

Maurice Rosenfield  
Executive Director

MR:jj  
enclosures

cc Fred Harm



VOL. XXXII—NO. 25 Park Ridge, Illinois, Thursday, September 29, 1955

## Weather Alert System Will Warn Ridgians

An effective early warning system for alerting Park Ridge residents of impending violent weather is near realization, according to Mayor W. Bert Ball, following the placement of a dozen ordinary-appearing table radios in selected sites throughout the city.

The radio receivers, acquired from Chicago radio station WAIT and especially designed to operate on the latter's waveband, form the pivotal point of a system designed to give school and municipal officials up-to-the-minute information on the strength and directional path of tornados and similar weather conditions.

WAIT retains a privately-operated weather watch service to augment the regular facilities of the U. S. Weather Bureau, and as a result boasts an alerting capacity generally superior to anything currently available to the public.

Now in effect, the system culminates a year-long effort on the part of city officials lead by Mayor Ball and Fire Chief Norman A. Brown, local civil defense director, to solve the problem of alleviating the danger to local residents, especially school children, rising from the demonstrated higher incidence of

CONTINUED ON PAGE 3

59

\*\*\*

## Weather Alert Warning System

CONTINUED FROM PAGE 1

severe weather in this area.

Sites selected for placement of the receivers include: offices of the city manager, police and fire chiefs; Lutheran Veterans hospital; Maine Township High Schools East and South; Elementary School District 54 headquarters; St. Paul of the Cross, Mary, Seat of Wisdom schools and the city public works garage.

It was pointed out in Mayor Ball's report that individuals can avail themselves of the same information to be transmitted in the event of impending alerts by tuning their home radios to station WAIT (820 kilocycles on the AM band).

Title	Source Type	Brief Description	Time Broadcast & Duration	How Often Broadcast
<u>Problems of the City Local</u>	Public Affairs	Discussional program of local problems produced by W-A-I-T in cooperation with Northwestern University	9:00 am (30-minutes)	Once weekly: 52 weeks during 1966
<u>From the Midway</u>	Local Educational	Public Affairs Discussional program produced by W-A-I-T in cooperation with the University of Chicago	10:00 am (60-minutes) 1/	Once weekly: 52 weeks during 1966

EXHIBIT 7  
 WAIT Form 301  
 February 10, 1967

1/ The length of this program is normally 60-minutes, however, some shows are shorter in length.





PROBLEMS OF THE CITYSunday, 1/2/66 - 9:00-9:30 am

Topic: "Mental Illness and the Law", Part I  
Participants: Judge Joseph Schneider, Circuit Court, Cook County  
John E. Coons, Professor of Law, Northwestern University

Sunday, 1/9/66 - 9:00-9:30 am

Topic: "Mental Illness and the Law", Part II  
Participants: Judge Joseph Schneider, Circuit Court, Cook County  
John E. Coons, Professor of Law, Northwestern University

Sunday, 1/16/66 - 9:00-9:30 am

Topic: "Mental Illness and the Law", Part III  
Participants: Judge Joseph Schneider, Circuit Court, Cook County  
John E. Coons, Professor of Law, Northwestern University

Sunday, 1/23/66 - 9:00-9:30 am

Topic: "Mental Illness and the Law", Part IV  
Participants: Judge Joseph Schneider, Circuit Court, Cook County  
John E. Coons, Professor of Law, Northwestern University

Sunday, 1/30/66 - 9:00-9:30 am

Topic: "Jack Ruby Trial", Part I  
Participants: Jon Waltz, Professor of Law, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 2/13/66 - 9:00-9:30 am

Topic: "The Measure of Man", Part I  
Participants: Eugene Webb, Professor, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 2/20/66 - 9:00-9:30 am

Topic: "The Measure of Man", Part II  
Participants: Eugene Webb, Professor, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 2/27/66 - 9:00-9:30 am

Topic: "Criminal Law and the Chicago Police Department:  
Participants: Col. Minor K. Wilson, Chicago Police Department  
John E. Coons, Professor of Law, Northwestern University

PROBLEMS OF THE CITYSunday, 3/6/66 - 9:00-9:30 am

Topic: "Criminal Law and the Chicago Police Department:  
Participants: Col. Minor K. Wilson, Chicago Police Department  
John E. Coons, Professor of Law, Northwestern University

Sunday, 3/13/66 - 9:00-9:30 am

Topic: "The Measure of Man", Part I  
Participants: Eugene J. Webb, Professor, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 3/20/66 - 9:00-9:30 am

Topic: "The Measure of Man" Part II  
Participants: Eugene J. Webb, Professor, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 3/27/66 - 9:00-9:30 am

Topic: "Civil Rights Housing and the Law", Part I  
Participants: Richard Newhouse, Legal Counsel,  
Committee Renewal Foundation  
John E. Coons, Professor of Law, Northwestern University

Sunday, 4/3/66 - 9:00-9:30 am

Topic: "Civil Rights Housing and the Law", Part II  
Participants: Richard Newhouse, Legal Counsel,  
Committee Renewal Foundation  
John E. Coons, Professor of Law, Northwestern University

Sunday, 4/10/66 - 9:00-9:30 am

Topic: "Police and Privacy"  
Participants: Alfred Kamin, Professor of Law, Loyola University  
John E. Coons, Professor Law, Northwestern University

Sunday, 4/17/66 - 9:00-9:30 am

Topic: "Remaking the Metropolis", Part I  
Participants: Howard M. Baron, Director of Research,  
Chicago Urban League  
John E. Coons, Professor of Law, Northwestern University

Sunday, 4/24/66 - 9:00-9:30 am

Topic: "Remaking the Metropolis", Part II  
Participants: Howard M. Baron, Director of Research,  
Chicago Urban League  
John E. Coons, Professor of Law, Northwestern University

PROBLEMS OF THE CITY

Sunday, 5/1/66 - 9:00-9:30 am

Topic: "Chicago Public School System", Part I  
Participants: Dr. Bernard Friedman, Chicago Board of Education  
John E. Coons, Professor of Law, Northwestern University

Sunday, 5/8/66 - 9:00-9:30 am

Topic: "Chicago Public School System", Part II  
Participants: Dr. Bernard Friedman, Chicago Board of Education  
John E. Coons, Professor of Law, Northwestern University

Sunday, 5/15/66 - 9:00-9:30 am

Topic: "Police and Privacy", Part I  
Participants: Alfred Kamm, Professor of Law, Loyola University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 5/22/66 - 9:00-9:30 am

Topic: "Police and Privacy", Part II  
Participants: Alfred Kamm, Professor of Law, Loyola University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 5/29/66 - 9:00-9:30 am

Topic: "The Measure of Man", Part I  
Participants: Eugene J. Webb, Professor, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 6/5/66 - 9:00-9:30 am

Topic: "The Measure of Man", Part II  
Participants: Eugene J. Webb, Professor, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 6/12/66 - 9:00-9:30 am

Topic: "Civil Rights Housing and the Law", Part II  
Participants: Richard Newhouse, Legal Counsel  
Community Renewal Foundation  
John E. Coons, Professor of Law, Northwestern University

Sunday, 6/19/66 - 9:00-9:30 am

Topic: "Civil Rights Housing and the Law", Part II  
Participants: Richard Newhouse, Legal Counsel,  
Community Renewal Foundation  
John E. Coons, Professor of Law, Northwestern University

PROBLEMS OF THE CITYSunday, 6/26/66 - 9:00-9:30 am

Topic: "Cancer"  
 Participants: Dr. Harold B. Haley, Jr., Associate Professor of Surgery,  
 Stritch School of Medicine  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 7/3/66 - 9:00-9:30 am

Topic: "Rags, Riches and Race," Part I  
 Participants: John McKnight, Director, Midwest Field Office,  
 U. S. Commission on Civil Rights  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 7/10/66 - 9:00-9:30 am

Topic: "Rags, Riches and Race", Part II  
 Participants: John McKnight, Director, Midwest Field Office,  
 U. S. Commission on Civil Rights  
 John E. Coons, Professor Law, Northwestern University

Sunday, 7/17/66 - 9:00-9:30 am

Topic: "The Draft -- The Draftnic and Vietnic", Part I  
 Participants: George Pontikes, Chicago Attorney,  
 the firm of Foss, Schuman and Drake, and a  
 member of the American Civil Liberties Union  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 7/24/66 - 9:00-9:30 am

Topic: "The Draft - The Draftnic and Vietnic", Part II  
 Participants: George Pontikes, Chicago Attorney,  
 the firm of Foss, Schuman and Drake, and a  
 member of the American Civil Liberties Union  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 7/31/66 - 9:00-9:30 am

Topic: "Civil Rights Housing and the Law", Part I  
 Participants: Richard Newhouse, Legal Counsel,  
 Community Renewal Foundation  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 8/7/66 - 9:00-9:30 am

Topic: "Civil Rights Housing and the Law", Part II  
 Participants: Richard Newhouse, Legal Counsel,  
 Community Renewal Foundation  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 8/14/66 - 9:00-9:30 am

Topic: "The New Breed and the Church"  
 Participants: Father John Banahan, Director of Radio-TV,  
 Catholic Archdiocese of Chicago  
 John E. Coons, Professor of Law, Northwestern University

**65** Sunday, 8/21/66 - 9:00-9:30 am

Topic: "Arguing About Taste"  
 Participants: Father John Banahan, Director of Radio-TV  
 Catholic Archdiocese of Chicago  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 8/28/66 - 9:00-9:30 am

Topic: "Public School System"  
 Participants: Bernard Freidman, Chicago Board of Education  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 9/4/66 - 9:00-9:30 am

Topic: "Cancer"  
 Participants: Dr. Harold B. Haley, Jr., Associate Professor of Surgery,  
 Stritch School of Medicine  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 9/11/66 - 9:00-9:30 am

Topic: "Insanity and the Criminal Law", Part I  
 Participants: John Heinz, Professor of Law, Northwestern University  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 9/18/66 - 9:00-9:30 am

Topic: "Insanity and the Criminal Law", Part II  
 Participants: John Heinz, Professor of Law, Northwestern University  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 9/25/66 - 9:00-9:30 am

Topic: "The Open City Treaty", Part I  
 Participants: John McDermitt, Executive Director,  
 Catholic Interracial Council of Chicago  
 Al Raby, Co-Chairman, Chicago Freedom Movement  
 John E. Coons, Professor of Law, Northwestern University

Sunday, 10/2/66 - 9:00-9:30 am

Topic: "The Open City Treaty", Part II  
 Participants: John McDermitt, Executive Director,  
 Catholic Interracial Council of Chicago  
 Al Raby, Co-Chairman, Chicago Freedom Movement  
 John E. Coons, Professor of Law, Northwestern University

PROBLEMS OF THE CITYSunday, 10/9/66 - 9:00-9:30 am

Topic: "Foster Children"  
Participants: Susan Hickman and Curt Dale,  
Department of Children, Family Services,  
State of Illinois  
John E. Coons, Professor of Law, Northwestern University

Sunday, 10/16/66 - 9:00-9:30 am

Topic: "The Draft, The Draftnic, The Vietnic", Part I  
Participants: George Pontikes, Chicago Attorney of the firm  
Foss, Schuman, Drake and member of the Board,  
American Civil Liberties Union  
John E. Coons, Professor of Law, Northwestern University

Sunday, 10/23/66 - 9:00-9:30 am

Topic: "The Draft, The Draftnic, The Vietnic", Part II  
Participants: George Pontikes, Chicago Attorney of the firm  
Foss, Schuman, Drake and member of the Board,  
American Civil Liberties Union  
John E. Coons, Professor of Law, Northwestern University

Sunday, 10/30/66 - 9:00-9:30 am

Topic: "The New Breed and the Church"  
Participants: Father John Banahan, Director of Radio-TV,  
Catholic Archdiocese of Chicago  
John E. Coons, Professor of Law, Northwestern University

Sunday, 11/6/66 - 9:00-9:30 am

Topic: "Integration in the Schools", Part I  
Participants: Dr. Gregory C. Coffin  
Mrs. James Moran  
John E. Coons, Professor of Law, Northwestern University

Sunday, 11/13/66 - 9:00-9:30 am

Topic: "Integration in the Schools", Part II  
Participants: Dr. Gregory C. Coffin  
Mrs. James Moran  
John E. Coons, Professor of Law, Northwestern University

Sunday, 11/20/66 - 9:00-9:30 am

Topic: "Insanity and the Criminal Law", Part I  
Participants: John Heinz, Professor of Law, Northwestern University  
John E. Coons, Professor of Law, Northwestern University



PROBLEMS OF THE CITY

Sunday, 11/27/66 - 9:00-9:30 am

Topic: "Landlords, Tenants and Cockroaches", Part I  
Participants: Gilbert Feldman, Attorney and Partner,  
Kleiman, Cornfield and Feldman  
John E. Coons, Professor of Law, Northwestern University

Sunday, 12/4/66 - 9:00-9:30 am

Topic: "Landlords, Tenants and Cockroaches", Part II  
Participants: Gilbert Feldman, Attorney and Partner,  
Kleiman, Cornfield and Feldman  
John E. Coons, Professor of Law, Northwestern University

Sunday, 12/11/66 - 9:00-9:30 am

Topic: "Problems of the Church and State"  
Participants: James C. Kirby, Professor of Law, Northwestern University  
John E. Coons, Professor of Law, Northwestern University

Sunday, 12/25/66 - 9:00-9:30 am

Topic: "Landlords, Tenants and Cockroaches"  
Participants: Gilbert Feldman, Attorney and Partner,  
Kleiman, Cornfield and Feldman  
John E. Coons, Professor of Law, Northwestern University

FROM THE MIDWAY

Sunday, January 2, 1966 - 10:00-10:59 a.m.

Topic: "The Tools of the African Historian"  
Speaker: Jan Vasina, Professor of History and Anthropology,  
University of Wisconsin

Sunday, January 9, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Towards A Cultural History of Central Africa" Part II  
Speaker: Jan Vasina, Professor of History and Anthropology,  
University of Wisconsin

Sunday, January 16, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Congo: Cultural Diversity and National Integration"  
Part III  
Speaker: Jan Vasina, Professor of History and Anthropology,  
University of Wisconsin

Sunday, January 23, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "The Sociology of Combat"  
Speakers: Charles Moscos, Assistant Professor of Sociology  
University of Michigan  
Morris Janowitz, Professor of Sociology, and  
Director, Center for Organizational Studies  
University of Chicago

Sunday, January 30, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Social Work and the Convicted Criminal"  
Speakers: Norval Morris, Professor of Law, University of Chicago  
Julius Kreeger, Director, Center for Studies in  
Criminal Justice, University of Chicago  
Topic: "People, Technology and the Future"  
Speaker: Ralph Helstein, President,  
United Packing House Workers of America,  
American Federation of Labor-Congress of  
Industrial Organizations

Sunday, February 6, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "The Minimum Wage Law and Unemployment"  
Speakers: Yale Brozen, Professor, Graduate School of Business,  
University of Chicago  
Milton Friedman, The Paul Snowden Russell Distinguished  
Service Professor of Economics, University of Chicago

FROM THE MIDWAY

Sunday, February 13, 1966 - 10:00-10:59<sup>1</sup>/<sub>2</sub> a.m.

Topic: "The Changing Strategic Role of Factors of Production"  
 Speaker: John K. Galbraith, Professor of Economics,  
 Harvard University

Sunday, February 20, 1966 - 10:00-10:59<sup>1</sup>/<sub>2</sub> a.m.

Topic: "Economic Policy: Intentions VS. Results"  
 Speaker: Milton Friedman, The Paul Snowden Russell Distinguished  
 Service Professor of Economics, University of Chicago

Sunday, February 27, 1966 - 10:00-10:59<sup>1</sup>/<sub>2</sub> a.m.

Topic: "United States Policy and Problems in Developing Countries"  
 Speaker: Harry G. Johnson, Professor of Economics, University of  
 Chicago, and Editor of The Journal Of Political Economy

Sunday, March 6, 1966 - 10:00-10:59<sup>1</sup>/<sub>2</sub> a.m.

Topic: "Highlights of the University of Chicago Law School  
 Conference on 'Consumer Credit and the Poor'"  
 Speakers: Representatives of Government, business, legal and  
 social service professions

Sunday, March 13, 1966 - 10:00-10:59<sup>1</sup>/<sub>2</sub> a.m.

Topic: "Highlights of the University of Chicago Law School  
 Conference on 'Consumer Credit and the Poor'" Program No. 2  
 Speakers: Representatives of Government, business, legal and  
 social service professions

Sunday, March 20, 1966 - 10:00-10:58<sup>1</sup>/<sub>2</sub> a.m.

Topic: "Highlights of the University of Chicago Law School  
 Conference on 'Consumer Credit and the Poor'" Program No. 3  
 Speakers: Representatives of Government, business, legal and  
 social service professions

Sunday, March 27, 1966 - 10:00-10:59 a.m.

Topic: "The Negro Family: A Challenge for National Action"  
 Speaker: Martin Luther King, Jr., President,  
 Southern Christian Leadership Conference

Topic: "Today's Quest for Civil Rights"  
 Speaker: Raymond Marks, Lecturer, The Graduate School of Business  
 and the School of Social Administration,  
 University of Chicago

FROM THE MIDWAY

Sunday, April 3, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Making Our Cities Fit For People"  
Speaker: The Honorable Paul H. Douglas, United States Senator  
from Illinois

Sunday, April 10, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Social Action Models"  
Speakers: Arthur Pearl, Professor, Department of Education,  
University of Oregon  
Ralph Caprio, Associate Director of Citizens Crusade  
Against Poverty, Washington, D. C.  
Thomas Sherrad, Director, Juvenile Delinquency and  
Project, School of Social Service Administration,  
University of Chicago

Sunday, April 17, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "A New Social Work Model"  
Speaker: Bertram M. Beck, Executive Director,  
Mobilization for Youth, New York City  
Topic: "Are There Limits to Conscience"  
Speaker: The Reverend John McKenzie, Visiting Professor,  
The Divinity School

Sunday, April 24, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Are There Limits to Conscience?"  
Speaker: The Reverend John McKenzie, Visiting Professor,  
The Divinity School

Sunday, May 1, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Civil Disobedience: When and When Not"  
Speaker: Harry Kabeen, Jr., Professor of Law,  
University of Chicago

Sunday, May 8, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Political Responsibility: The Relativity of Choice"  
Speaker: Franklin Littell, Professor of Church History,  
Chicago Theological Seminary

Sunday, May 15, 1966 - 10:00 $\frac{1}{2}$ -10:59 $\frac{1}{2}$  a.m.

Topic: "Higher Mis-Education"  
Speaker: Paul Goodman, Author and Educator

FROM THE MIDWAY

Sunday, May 22, 1966 - 10:01-10:59 $\frac{1}{2}$  a.m.

Topic: "Collapse of American Public Education"  
Speaker: Phillip Hauser, Professor, Department of Sociology;  
Director, Population Research and Training Center and  
Chicago Community Inventory.  
Topic: "Learning Theory and the Adult"  
Speaker: William Griffith, Assistant Professor, Department of  
Education, University of Chicago

Sunday, May 29, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "All Mice Are Not Equal"  
Speaker: Benson E. Ginsburg, The William Rainey Harper Professor  
of Biology, and Professor, Division of Biological  
Sciences, University of Chicago

Sunday, June 5, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "The State of Political Democracy in the 20th Century"  
Part I  
Speaker: Sir Denis Brogan, Professor, Department of Political  
Science, and Fellow of Peterhouse,  
Cambridge University

Sunday, June 12, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "The State of Political Democracy in the 20th Century  
—The Triumph and Defeat of Classical Democracy"  
Part II  
Speaker: Sir Denis Brogan, Professor, Department of Political  
Science, and Fellow of Peterhouse,  
Cambridge University

Sunday, June 19, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "The State of Political Democracy in the 20th Century  
—New Tides" — Part III  
Speaker: Sir Denis Brogan, Professor, Department of Political  
Science, and Fellow of Peterhouse,  
Cambridge University

Sunday, June 26, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Social Factors in Political Behavior"  
Speaker: James A. Davis, Associate Professor, Department of  
Sociology, University of Chicago

FROM THE MIDWAY

Sunday, July 3, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "A Psychologist Views Freedom"  
 Speaker: Marvin Frankel, Assistant Professor, Department of  
 Psychology, University of Chicago

Sunday, July 10, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Liberty"  
 Speaker: Marshall Cohen, Assistant Professor, Department of  
 Philosophy, University of Chicago

Sunday, July 17, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Utopia and Revolution" (The Utopian Dream)--Part I  
 Speaker: Melvin J. Lasky, Editor of Encounter,  
 London, England

Sunday, July 24, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Utopia and Revolution" (Revolutionary Commitments)--  
 Part II  
 Speaker: Melvin J. Lasky, Editor of Encounter,  
 London, England

Sunday, July 31, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Utopia and Revolution" (Principles and Heresy)--Part III  
 Speaker: Melvin J. Lasky, Editor of Encounter,  
 - London, England

Sunday, August 7, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Platonic Education: Creativity and Method"--Part I  
 Speakers: Wayne C. Booth, Dean of the College, University of Chicago  
 James M. Redfield, Master, New Collegiate Division, and  
 Associate Dean of the College, University of Chicago

Sunday, August 14, 1966 - 10:00-10:58 $\frac{1}{2}$  a.m.

Topic: "Is There Any Knowledge That We Must Have?"--Part II  
 Speaker: Wayne C. Booth, Dean of the College, University of Chicago

Sunday, August 21, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Education and Public Life"--Part III  
 Speaker: Terry Sanford, Attorney, and former Governor of  
 North Carolina



FROM THE MIDWAY

Sunday, August 28, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Undergraduates and the Scientific Enterprise"  
Speaker: John A. Simpson, Professor, Department of Physics,  
University of Chicago  
Topic: "Diversity"  
Speaker: John R. Platt, Acting Director, Mental Health  
Research Institute

Sunday, September 4, 1966 - 10:00-10:58 $\frac{1}{2}$  a.m.

Topic: "World Futures"  
Speaker: Herman Kahn, Director of Hudson Institute, New York

Sunday, September 11, 1966 - 10:00 $\frac{1}{2}$ -10:59 $\frac{1}{2}$  a.m.

Topic: "Changing World Understanding"  
Speaker: Hans J. Morgenthau, The Albert A. Michelson  
Distinguished Service Professor, Department of  
Political Science and History, and Director of  
the Center for the Study of American Foreign and  
Military Policy  
Topic: "Britain's Role in the World Today"  
Speaker: Sir Patrick Dean  
British Ambassador to the United States

Sunday, September 18, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Three Political Traditions"  
Speaker: Mark Haller, Assistant Professor, Department of  
History, The College, University of Chicago

Sunday, September 25, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Some Styles of the Social Intellectual: Captivity,  
Estrangement, Incrementalism, and the Prophetic Function"  
Speaker: Milton J. Rosenberg, Professor, Department of Psychology,  
University of Chicago

Sunday, October 2, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Conscience, Law and Civil Disobedience"  
Speaker: Donald Zoo, Associate Professor, Department of  
Political Science, Kansas City College, Pittsburg, Kansas  
Topic: "The Problems of a Developing Constitution"  
Speaker: The Honorable Carl McGowan, United States Circuit Judge,  
Washington, D. C.

FROM THE MIDWAY

Sunday, October 9, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Federal Executive Order No. 10988"  
Speaker: James J. Reynolds, Assistant Secretary of Labor  
Topic: "Organizing and Collective Bargaining by Public Employees"  
Speaker: Jerry Nurf, President, American Federation of State, County, and Municipal Employees

Sunday, October 16, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Art and Technology"  
Speaker: August Neckscher, Director, Twentieth Century Fund  
Topic: "Race in the City"  
Speaker: Nathan Glazer, Professor of Sociology, University of California, Berkeley

Sunday, October 23, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "The Negro Family"  
Speaker: Daniel P. Moynihan, Professor, Wesleyan University

Sunday, October 30, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Desegregation: What Impact on the Urban Scene?"  
Speaker: Whitney H. Young, Jr., Executive Director, National Urban League

Sunday, November 6, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "Urbanization in the Development World"  
Speaker: David Owen, Co-administrator, United Nations Development Program

Sunday, November 13, 1966 - 10:00-10:59 $\frac{1}{2}$  a.m.

Topic: "The New Urbanism: Fiscal, Environmental and Political Aspects"  
Speaker: The Honorable Joseph S. Clark, United States Senator from Pennsylvania - Democrat  
Topic: "National Urban Policy"  
Speaker: Martin Meyerson, Dean, School of Environmental Design, University of California, Berkeley

Sunday, November 20, 1966 - 10:00-10:58 $\frac{1}{2}$  a.m.

Topic: "The Cities and The States: The Unfinished Agenda"  
Speaker: Terry Sanford, Former Governor of North Carolina and Director of Duke University's "A Study of American States"

FROM THE MIDWAY

Sunday, November 27, 1966 - 10:02-10:59 $\frac{1}{2}$  a.m.

Topic: "The New Social-Industrial Complex"  
 Speaker: Lyle Spencer, President of Science Research Associates, Inc. (subsidiary of IBM)  
 Topic: "Current Trends: A Superintendent's Perspective"  
 Speaker: Paul Briggs, Superintendent of Schools, Cleveland, Ohio

Sunday, December 4, 1966 - 10:01 $\frac{1}{2}$ -10:59 $\frac{1}{2}$  a.m.

Topic: "The Culturally Disadvantaged Child and Literature"  
 Speaker: Marian Edman, Professor, Department of Education, Wayne State University, Detroit, Michigan

Sunday, December 11, 1966 - 10:03-11:00 a.m.

Topic: "Children's Reading and Adult Values"  
 Speaker: Edward W. Rosenheim, Professor, Department of English, University of Chicago  
 Topic: "The Anthropomorphic Machine in Children's Literature"  
 Speaker: Joseph Swarcz, Graduate Student, Department of English, University of Chicago

Sunday, December 18, 1966 - 10:02 $\frac{1}{2}$ -10:59 $\frac{1}{2}$  a.m.

Topic: "Some Current Issues in Mental Retardation"  
 Speaker: George Tarian, Professor, Department of Psychiatry, University of California  
 Topic: "Organic Considerations"  
 Speaker: Norman Kretchmer, Professor and Executive Head, Department of Pediatrics, Stanford Medical Center  
 Topic: "Cultural and Social Considerations"  
 Speaker: Julius B. Richmond, Dean, Medical Faculty at the State University of New York Upstate Medical Center

Sunday, December 25, 1966 - 10:01 $\frac{1}{2}$ -10:59 $\frac{1}{2}$  a.m.

Topic: "The Development Of Intelligence"  
 Speaker: Leon Eisenberg, Professor of Child Psychiatry, Johns Hopkins Medical School  
 Topic: "Youth In Family And Community"  
 Speaker: Monrad G. Paulson, Columbia Law School

\* \* \*

## EXHIBIT 9

WAIT Form 301

February 10, 1967

## CHICAGO DAILY NEWS

An Independent Newspaper Founded January 1, 1876

Marshall Field, Publisher (1959-1965)

Roy M. Fisher  
EditorCreed C. Black  
Managing EditorKenneth McArdle  
Associate Editor

Russ Stewart, Vice President

John G. Trezevant  
General ManagerLeo R. Newcombe  
Business ManagerMarshall Field  
Asst. to General Manager

Pulitzer gold medals for "most disinterested and meritorious public service" were received in 1959, 1957 and 1963. The 1953 award was the 12th Pulitzer Prize received by The Daily News or members of its staff since 1925.

Editorial Page Staff: Fred J. Panawitz, Chief Editorial Writer; Gerry Robichaud, R. J. Bickely, Paul Greenberg, Walter R. Green, Sydney J. Harris, Cecil Jensen



14

Wednesday, February 15, 1967

## Near-Fatal Error Mended

Recent controversial decisions by the U. S. Supreme Court come into sharper focus as a result of the case of Lloyd Eldon Miller Jr. In overturning the conviction of the Canton (Ill.) cabdriver Monday, the court made it plain that Illinois came close to conducting a legal lynching.

Miller was convicted in Fulton County of the 1955 rape-murder of an 8-year-old girl. At one time he was only seven hours away from the electric chair. Yet when his appeal finally reached the Supreme Court, the justices were unanimous in finding that his conviction rested on "evidence" that was incomplete, erroneous, or falsified. He was interrogated for long hours, denied right of counsel, and even though he repudiated a "confession" immediately afterward, it was used against him.

The question of Miller's guilt or innocence has not been finally established. It remains to be decided whether the state will try him again. But the high court did

determine that Miller had been denied his constitutional right of fair trial. Methods employed by the prosecution in 1956 would not be tolerated today. The people who believed Miller innocent and fought in his behalf — including radio station WAIT and the American Civil Liberties Union — have in any case prevented a grave miscarriage of justice.

The whole story reflects badly on the administration of justice in Illinois — at least as justice was administered in the '50s — and underscores the need for the guidelines laid down by the Supreme Court in recent years. It also raises the specter that the state came close to executing a man who may be innocent of the brutal crime he was accused of.

A bill to abolish the death penalty passed the Illinois House two years ago, but was blocked in the Senate. The Miller case should revive attempts to do away with capital punishment in this session.

# Chicago's AMERICAN

EDITORIAL PAGE

STUART LACEY, Publisher

LLOYD WEXLER, Editor

Largest Evening Circulation

in Chicago and Suburbs

20 WEDNESDAY, FEBRUARY 15, 1967

## The Fight to Execute Miller

THE SUPREME COURT has reversed the conviction of Lloyd Eldon Miller Jr. of Canton, Ill., apparently putting an end to 12 years of dogged effort by the state to have Miller killed for the crime whether he was guilty or not. The state might decide to retry him for the 1955 rape-slaying of 8-year-old Janice May, but if it does it will have to rely on genuine, nonfaked evidence, and if that wasn't enough at Miller's first trial 10 years ago it presumably would not be enough now.

The court said the prosecution "deliberately misrepresented the truth" during Miller's trial. It cited one particularly glaring piece of deception, the allegedly bloodstained pair of men's shorts found a mile from the murder scene. A chemist for the Illinois crime laboratory testified that the blood on the shorts was the same type as that of the victim. At a habeas corpus hearing in December, 1959—which, incidentally, had been granted by a federal judge just seven hours before Miller was scheduled to die in the electric chair—a microanalyst testified the stains were not blood at all, but paint.

Investigations that were inspired and conducted mainly by Chicago radio station WATT also brought out these facts about Miller's conviction:

Miller's former landlady, Mrs. Alice Baxter, told WATT's investigator that Miller, at the time of the murder, had gone to the drugstore on an errand for her. The testimony indicated that Miller was a mile and a half away when the crime was committed. But Mrs. Baxter was not called to testify; at the habeas corpus hearing, the prosecution admitted that it had discouraged her from talking to Miller's defense counsel. A key prosecution witness, Betty Baldwin Currie, admitted at the same hearing that she had lied at the original trial when she said Miller had confessed the crime to her. It was established that the prosecution knew her testimony was partly lies, but it remained silent.

Miller signed a confession after 50 hours of detention and 16 hours of protracted questioning without legal counsel, but repudiated it the same day. The confession, written by a policeman, showed striking gaps and illogicalities (for instance, Miller "confessed" throwing some bloodstained clothing onto a passing freight car, but railroad records showed that no freight car had passed thru Canton that day).

WATT has our respectful thanks and congratulations; its years of effort stopped what looks like an attempted rail-roading. But many questions remain.

A man was nearly executed on the basis of suppressed, twisted, or faked evidence, presumably because the state needed a conviction for this fiendish crime and was determined to get one fast. Miller now seems innocent; is the real killer still at large? If this kind of judicial frameup could happen once, could it have happened before or since? Can the power to kill men and women be entrusted to a state when officials use it like this?

48

CHICAGO SUN-TRIBUNE, Tues., Feb. 14, 1957



## KUP'S COLUMN

KUPCINET

THE U.S. SUPREME COURT DECISION  
overruling the death penalty of Lloyd  
Eldon Miller is, in effect, a victory for WAIT.

The radio station uncovered new evidence in its private investigation of the case and for four years has proclaimed Miller's innocence. WAIT owner Maurice Rosenfield joined the American Civil Liberties Union in filing briefs before the court. . . .



WALTER F. KEAN

RIVERSIDE, ILLINOIS

ENGINEERING STATEMENT  
APPLICATION FOR CONSTRUCTION PERMIT  
820 kc. 5 kw-L, 10 kw-DA-N-U  
W A I T RADIO  
CHICAGO, ILLINOIS

DECEMBER, 1966



*Walter F. Kean*  
Walter F. Kean P.E.

Date *January 10, 1967*

ENGINEERING STATEMENT FOR  
RADIO STATION W A I T  
CHICAGO, ILLINOIS  
DECEMBER, 1966

This engineering statement has been prepared for W A I T Radio, licensee of Radio Station W A I T. Chicago, Illinois. This statement is in support of a request for a construction permit to add a nighttime service to the facilities of Radio Station W A I T.

At the present time W A I T operates on 820 kc., at 5.0 kilowatts of power, employing a non-directional antenna, Limited Time. It is proposed to employ a separate site for the nighttime operation, on the same frequency of 820 kc., at 10 kilowatts of power, utilizing a four tower directional antenna system.

820 kc. is a Class I-A channel upon which WFAA and WPAB at Dallas and Fort Worth, respectively, conduct a share time operation with 50 kilowatts, non-directional, fulltime. For the purpose of this statement it has been determined that nighttime operation of the antenna system described here would not cause "objectionable interference" to WFAA/WBAP within its 0.5 mv/m 50% time nighttime skywave contour, in any white area, i.e., area without at least one groundwave primary nighttime service.

Radio Station HIAZ, Santiago de los Caballeros, Dominican Republic, operates on 820 kc., with a power of 3.0 kilowatts, unlimited time, as notified in the NARBA change list 1/62, dated September 26, 1962. The distance from the proposed operation to HIAZ is 1,765 miles at a bearing of  $145^{\circ}$  True. The radiation from the proposed W A I T night antenna is 34 mv/m unattenuated at one mile. This would place a 10% time nighttime skywave signal of 2.35 microvolts per meter at HIAZ and would not cause objectionable interference. No objectionable interference would be caused to any other stations, existing or proposed.

The groundwave primary contours of the stations listed and shown on the maps were determined by taking the radiation characteristics of those stations from FCC official lists and files, using M-3 conductivities. The distances were determined in accordance with Section 73.183, using the appropriate graphs of Section 73.184. The equivalent distance method of computation was used over paths of multiple conductivity.

For determination of skywave signals the methods prescribed in Section 73.182(t) were used. The WFAA/WBAP interference free contour shown on the maps is the 20 to 1 ratio contour of the WFAA/WBAP 50 percent time skywave signals to the 10 percent time skywave signals of the proposed W A I T.

Broadcast Application		FEDERAL COMMUNICATIONS COMMISSION		Section V-A				
<b>STANDARD BROADCAST ENGINEERING DATA</b>		Name of applicant <b>Radio Station W A I T</b>						
<p>1. Indicate by check mark the purpose of this application. (The items of this Section that are applicable to, and must be answered for, each category are shown to the right of the category.)</p> <table style="width: 100%;"> <tr> <td style="vertical-align: top;"> <input type="checkbox"/> Construct a new station  <input type="checkbox"/> Change station location to a different city or town  <input checked="" type="checkbox"/> Change power  <input checked="" type="checkbox"/> Change transmitter location  <input type="checkbox"/> Change frequency  <input type="checkbox"/> Change from DA to Non-DA  <input type="checkbox"/> Change from Non-DA to DA  <input checked="" type="checkbox"/> Change in antenna system (including increase in height by addition of FM or TV antenna) </td> <td style="vertical-align: middle; text-align: center;">All items</td> <td style="vertical-align: top;"> <input type="checkbox"/> Install new Auxiliary Transmitter  <input type="checkbox"/> Install new Alternate Main Transmitter  <input type="checkbox"/> Change transmitter (non type accepted)  <input type="checkbox"/> Change Main Studio Location to point outside city limits and not at transmitter site  <input type="checkbox"/> Change Hours of Operation  <input type="checkbox"/> Other (specify): _____ </td> <td style="vertical-align: top;"> <div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7, and 10</div> </div> <div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7</div> </div> <div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7 (and appropriate other items)</div> </div> </td> </tr> </table>					<input type="checkbox"/> Construct a new station <input type="checkbox"/> Change station location to a different city or town <input checked="" type="checkbox"/> Change power <input checked="" type="checkbox"/> Change transmitter location <input type="checkbox"/> Change frequency <input type="checkbox"/> Change from DA to Non-DA <input type="checkbox"/> Change from Non-DA to DA <input checked="" type="checkbox"/> Change in antenna system (including increase in height by addition of FM or TV antenna)	All items	<input type="checkbox"/> Install new Auxiliary Transmitter <input type="checkbox"/> Install new Alternate Main Transmitter <input type="checkbox"/> Change transmitter (non type accepted) <input type="checkbox"/> Change Main Studio Location to point outside city limits and not at transmitter site <input type="checkbox"/> Change Hours of Operation <input type="checkbox"/> Other (specify): _____	<div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7, and 10</div> </div> <div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7</div> </div> <div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7 (and appropriate other items)</div> </div>
<input type="checkbox"/> Construct a new station <input type="checkbox"/> Change station location to a different city or town <input checked="" type="checkbox"/> Change power <input checked="" type="checkbox"/> Change transmitter location <input type="checkbox"/> Change frequency <input type="checkbox"/> Change from DA to Non-DA <input type="checkbox"/> Change from Non-DA to DA <input checked="" type="checkbox"/> Change in antenna system (including increase in height by addition of FM or TV antenna)	All items	<input type="checkbox"/> Install new Auxiliary Transmitter <input type="checkbox"/> Install new Alternate Main Transmitter <input type="checkbox"/> Change transmitter (non type accepted) <input type="checkbox"/> Change Main Studio Location to point outside city limits and not at transmitter site <input type="checkbox"/> Change Hours of Operation <input type="checkbox"/> Other (specify): _____	<div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7, and 10</div> </div> <div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7</div> </div> <div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">}</div> <div>2 thru 7 (and appropriate other items)</div> </div>					
<p>If this application is not for a new station, summarize briefly the nature of the changes proposed:</p> <p style="text-align: center;">Add a 10 kilowatt nighttime service from a second site employing a four tower directional antenna system.</p>								
2. Facilities requested		10. Antenna system, including ground or counterpoise						
Frequency	Hours of operation	Power in kilowatts Night      Day	Non-Directional Antenna:      Directional Antenna:					
820 kc.	Unlimited	10.0    5.0	Day <input checked="" type="checkbox"/> Night <input type="checkbox"/> Day only (DA-D) <input type="checkbox"/> Night only (DA-N) <input checked="" type="checkbox"/> Same constants and power day and night (DA-1) <input type="checkbox"/> Different constants or power day and night (DA-2) <input type="checkbox"/>					
3. Station location		(If a directional antenna is proposed submit complete engineering data. Show clearly whether directional operation is for day or night or both. If day and night patterns are different give full information on each pattern. This information is in addition to the information in Paragraph 10 and is submitted as Exhibit No. and signed by the engineer who designed the antenna system.) <b>Figure 1 and attached</b>						
State	City or town							
Illinois	Chicago							
4. Transmitter location								
State	County							
Illinois	Cook							
City or town	Street Address (or other identification)							
Chicago	95th and Kean ave.							
5. Main studio location								
State	County							
Illinois	Cook							
City or town	Street and number, if known							
Chicago	On file-No Change							
6. Remote control point location								
State	City or town							
Does not apply								
Street Address (or other identification)								
7. Transmitter								
Make	Type No.	Rated Power						
Gates	BC-10H	10 kw						
(If the above transmitter has not been accepted for licensing by the F.C.C., attach as Exhibit No. a complete showing of transmitter details. Showing should include schematic diagram and full details of frequency control. If changes are to be made in licensed transmitter include schematic diagram and give full details of change.)								
8. Modulation monitor								
Make	Type No.							
Gates	M-5693							
9. Frequency monitor								
Make	Type No.							
Gates	M-4990							
		Excitation      Series <input checked="" type="checkbox"/> Shunt <input type="checkbox"/> Geographic coordinates to nearest second. For direction antenna give coordinates of center of array. For single vertical radiator give tower location. North latitude      West longitude <div style="display: flex; justify-content: space-around;"> <span>41° 42' 58"</span> <span>87° 50' 33"</span> </div>						
		If not fully described above, give further details and dimensions including any other antennas mounted on tower and associated isolation circuits as Exhibit No. (Height figures should not include obstruction lighting.) <b>See attached</b>						
		Submit as Exhibit No. 2 & 2A a plot of the transmitter site showing boundary lines, and roads, railroads, or other obstructions; and also layout of the ground system or counterpoise. Show number and dimensions of ground radials or if a counterpoise is used, show height and dimensions.						
		11. Attach as Exhibit No. 3 & 3A a sufficient number of aerial photographs taken in clear weather at appropriate altitudes and angles to permit identification of all structures in the vicinity. The photographs must be marked so as to show compass directions, exact boundary lines of the proposed site, and locations of the proposed 1000 mv/m contour for both day and night operation. Photographs taken in eight different directions from an elevated position on the ground will be acceptable in lieu of the aerial photographs if the data referred to can be clearly shown.						

## 12. Allocation Studies:

Figures 3, 4, 5, 6, 7 and 8

A. Attach as Exhibit No. map or maps, having reasonable scales, showing the 1000, 25, 5, 2, normally protected and interference-free contours in mv/m for both day and night operation both existing and as proposed by the application. (NOTE: The 2 mv/m night contour need not be supplied if service is not rendered thereto.)

B. (1) For daytime operation, attach as Exhibit No. No change location study, utilizing Figure H-3 of the Rules or an accurate full scale reproduction thereof and using pertinent field strength measurement data where available, a full scale exhibit of the entire pertinent area to show the following:

- Normally protected, the interference-free, and the interfering contours for the proposed operation along all azimuths.
- Complete normally protected and interference-free contours of all other proposals and existing stations to which objectionable interference would be caused.
- Interfering contours over pertinent areas of all other proposals and existing stations from which objectionable interference would be received.
- Normally protected and interfering contours over pertinent areas of all other proposals and existing stations which require study to show the absence of objectionable interference.
- Plot of the transmitter location of each station or proposal requiring investigation, with identifying call letters, file numbers, and operating or proposed facilities.
- Properly labeled longitude and latitude degree lines, shown across entire exhibit.

(2) For daytime operation, when necessary to show more detail, attach as Exhibit No. Fig. 5 an additional allocation study, utilizing World or Sectional Aeronautical charts to clearly show interference or absence thereof.

(3) For daytime operation, attach as Exhibit No. Attached tabulation of the following:

- Azimuths along which the groundwave contours were calculated for all stations or proposals shown on allocation study exhibits required by Paragraph 12B above.
- Inverse distance field strength used along each azimuth.
- Basis for ground conductivity utilized along azimuths specified in (3) (a). If field strength measurements are used, the measurements must be either submitted or be properly identified as to location in Commission files.

C. For nighttime operation, attach as Exhibit No. Attached, allocation data to include the following:

- Proposed nighttime limitation to other existing or proposed stations with which objectionable interference would result, as well as those other proposals and existing stations which require study to clearly show absence of objectionable interference.
- All existing or proposed nighttime limitations which enter into the nighttime R.S.S. limitation of each of the existing or proposed facilities investigated under C (1) above.
- All existing and proposed limitations which contribute to the R.S.S. nighttime limitation of the proposed operation, together with those limitations which must be studied before being excluded.
- A detailed interference study plotted upon an appropriate scale map if a question exists with respect to nighttime interference to other existing or proposed facilities along bearings other than on a direct line toward the facility considered.
- Utilizing an appropriate scale map, clearly show the normally protected and interference-free contours of each of the existing and proposed stations which would receive nighttime interference from the proposed operation.
- The detailed basis for each nighttime limitation calculated under C (1) (2) (3) and (4) above, including a copy of each pertinent radiation pattern in the vertical plane and basis therefor.

13. Attach as Exhibit No. Attached tables of the areas and populations within the contours included in Paragraph 12 (A) above, as well as within the normally protected and interference-free contours of each station or proposed operation to which interference would be caused according to the Commission Rules.

NOTE: See the Standard Broadcast Technical Standards. All towns and cities having populations in excess of those given in Section 3.182(g) are not to be included in the tabulation of populations within the service contours. The 1950 or later Census Minor Civil Division maps are to be used in making population counts, subtracting any towns or cities not receiving adequate service, and where contours cut a minor division assuming a uniform distribution of population within the division, to determine the population included in the contours unless a more accurate count is made.)

14. Attach as Exhibit No. map or maps having reasonable scales clearly showing the following:

**Figures 3, 6 and 11**

(a) Proposed antenna location

(b) General character of the city or metropolitan district, particularly the retail business, wholesale business, manufacturing, residential, and unpopulated areas (by symbols, cross-hatching, colored crayons, or other means)

(c) Heights of buildings or other structures and terrain elevations in the vicinity of the antenna, indicating the location thereof.

(d) Transmitter location and call letters of all radio stations (except amateur) and the location of established commercial and government receiving stations within 2 miles of the proposed transmitter location. Call letters and locations of broadcast stations, including FM and television, within 5 miles must be shown.

(e) Terrain

15. If this application is for modification of construction permit state briefly as Exhibit No. Does not apply the present status of construction and indicate when it is expected that construction will be completed.

I certify that I represent the applicant in the capacity indicated below and that I have examined the foregoing statement of technical information and that it is true to the best of my knowledge and belief.

Date Jan 10 1967

Signature Walter F. Kean  
(check appropriate box below)

**Walter F. Kean**  
☐ Technical Director ☐ Chief Operator  
☒ Registered Professional Engineer  
☒ Consulting Engineer

\* \* \*



## AREA &amp; POPULATION SUMMARY

## EXISTING W A I T DAY

<u>Contour</u>	<u>Area</u>	<u>Population</u>
1000 mv/m	0.61 sq. mi.	less than 18,000 persons
25	380	1,279,571
5	2,540	6,141,734
2	5,880	7,083,035
0.5	19,380	7,629,209
Int. Free	17,230	7,543,198
Int. Area From WOSU	2,150	86,011

## PROPOSED W A I T NIGHT

1000 mv/m	1.08 sq. mi.	3,068 persons
25	398	3,962,056
20.6 (Int. Free)	465	4,407,943
5	1,268	5,816,720
2.5 (Norm. Prot.)	2,390	6,358,615

## W F A A - W B A P NIGHT

0.5 mv/m (50% Skywave)	1,142,000 sq. mi.	20,567,416 persons
Int. Free	1,071,300	18,401,914
Int. Area from Prop. WAIT night	70,700	2,165,502

AREAS

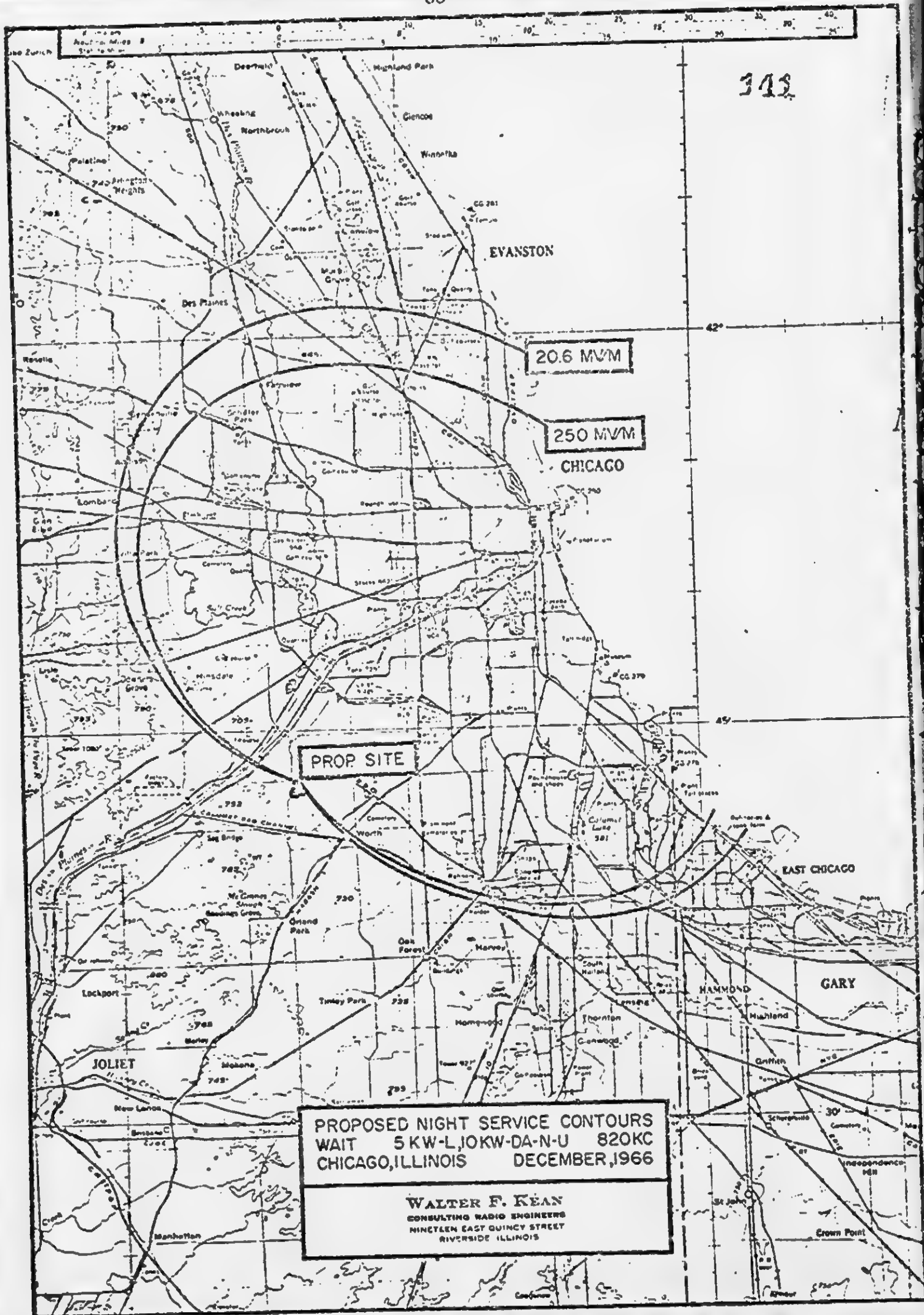
The area within each contour was determined by measuring its area in square inches with a polar planimeter. These areas were converted into square miles with a conversion factor computed from the scale of miles for each map.

POPULATION

The contours were plotted on Census Bureau Minor Civil Division Maps. For each contour a tabulation was made of all civil divisions included, with a notation of the percent of each included within the contour. Where a minor civil division was partly included within the contour, uniform distribution of population was assumed within the division, and population prorated according to area included. The population data for each civil division was obtained from the 1960 U.S. Census.

Population residing within communities of over 2500 persons between the 0.5 and 2.0 mv/m contours were excluded from the totals. This exclusion was also applied between the W F A A-W B A P 50% 0.5 mv/m and 2.0 mv/m groundwave contour.

For the proposed 1000 mv/m contour a house count was made from the aerial photograph and four persons assumed for each house.



ELEV 280 FLEI

L A K E

PROPOSED NIGHT CONTOURS  
 WAIT 5KW-L JOKV-DA-N-U 820 KC  
 CHICAGO, ILLINOIS DECEMBER, 1936

WALTER F. KEAN  
 CONSULTING RADIO ENGINEER  
 NINETEEN EAST QUINCY STREET  
 RIVERSIDE ILLINOIS

LAKE MICHIGAN

ELEV 500

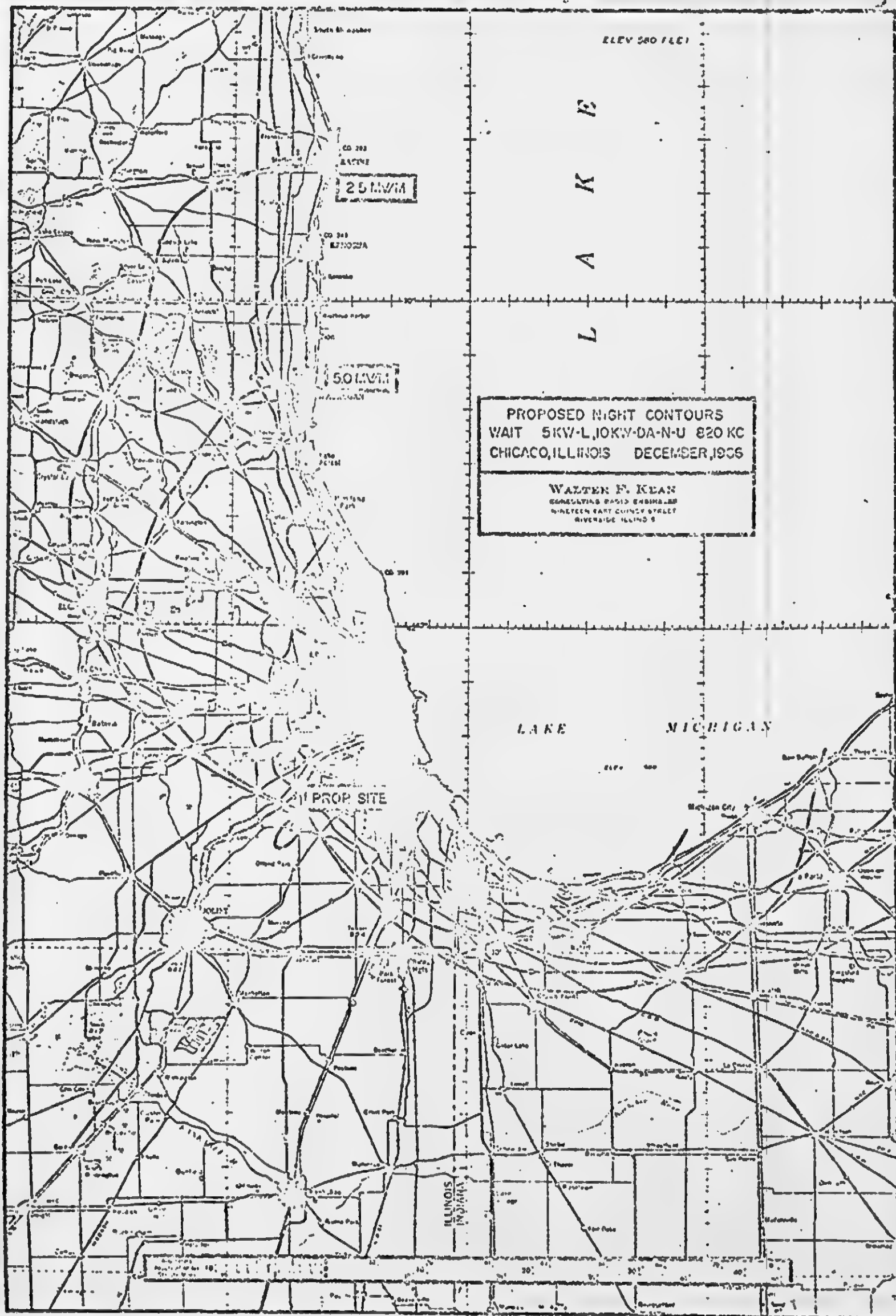
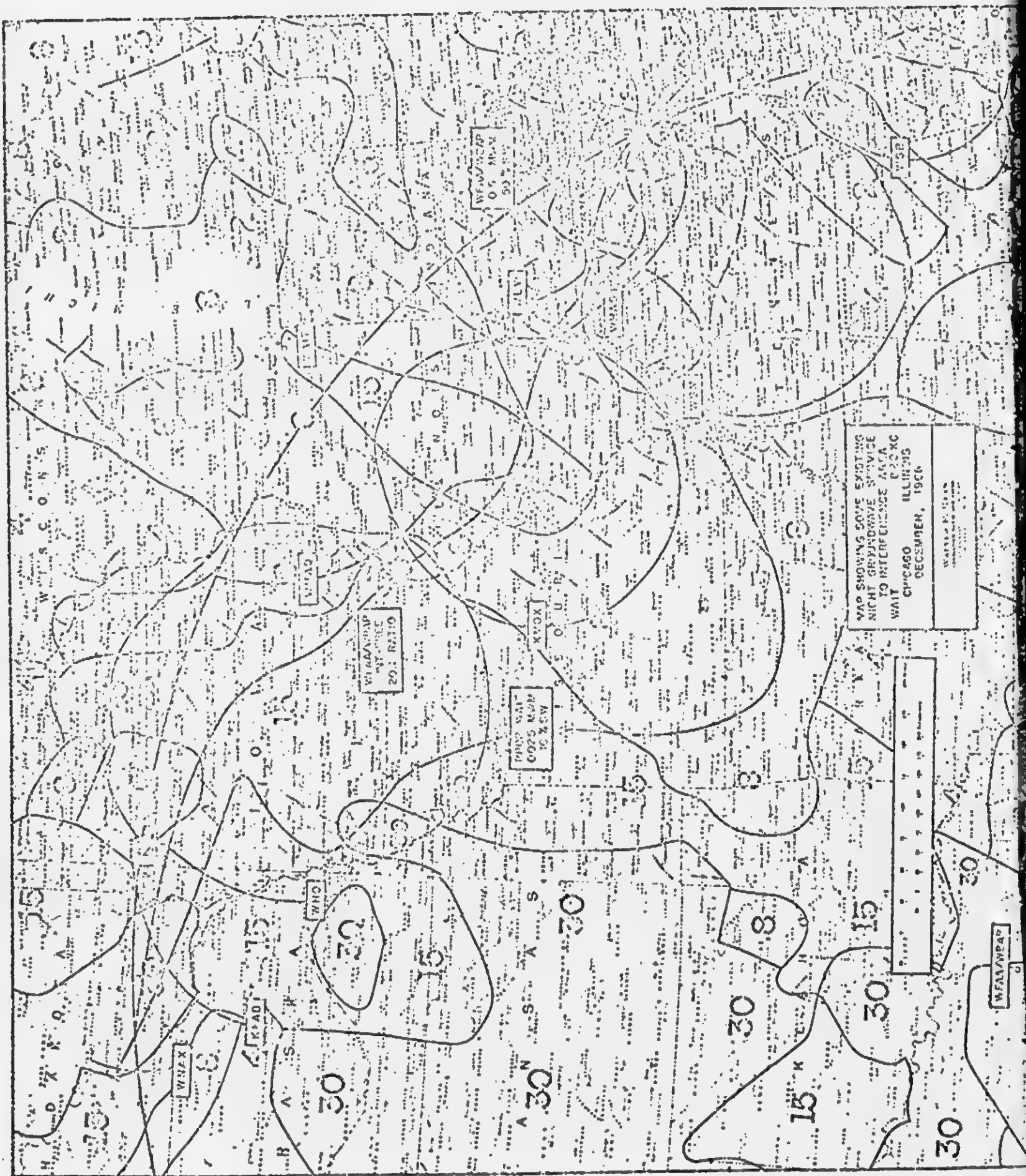


FIGURE 8



**BEST COPY**  
from the original



UNITED STATES  
DIVISION OF OCEANOGRAPHY

144

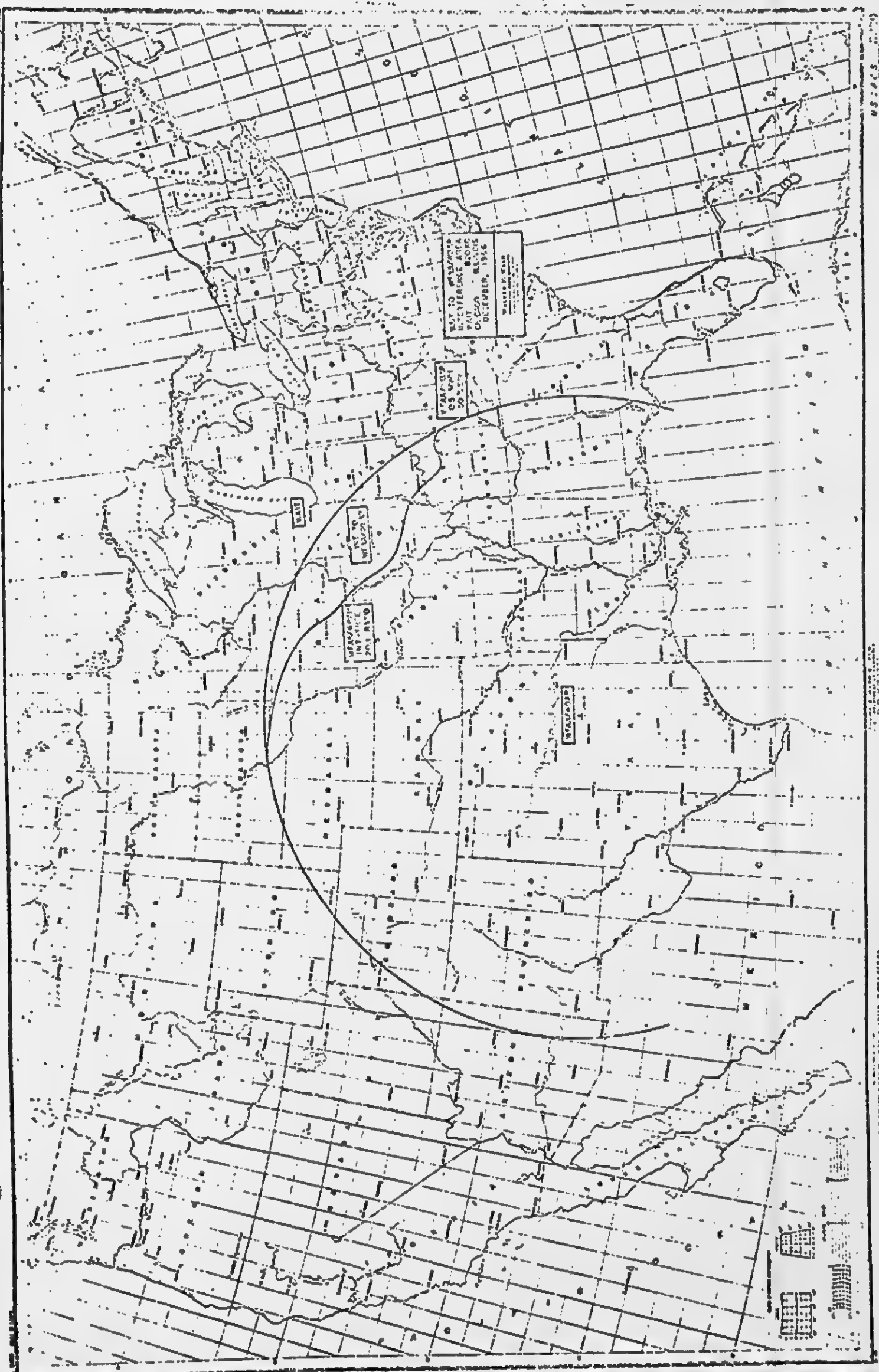


FIGURE 19



148

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington 25, D. C.



IN THE MATTER

OF

RADIO STATION WAIT

Docket No.

REQUEST FOR WAIVER AND PETITION  
FOR ORAL PRESENTATION

Now come MAURICE ROSENFELD, LOIS F. ROSENFELD,  
HAROLD A. WEISS, ROBERT G. WEISS, and DEVCE, SHADUR,  
MIKVA and PLOTKIN, a co-partnership, hereinafter called  
Applicant, operators of AM Radio Station WAIT, a daytime  
station, operating on 820 kc/s in Chicago, Illinois, and  
advise the Commission that they have contemporaneously  
with this request filed an Application, Form 301, dated  
February 10, 1967, for authority to operate nighttime on  
the same channel.

Pursuant to FCC Rules and Regulations Part I, §1.566, Applicant now respectfully requests the Commission to waive §§73.21, 73.24, 73.25 and 73.182. (d) of the Rules and Regulations of the Commission and any other provisions of the said rules and regulations or other requirements which might be deemed to bar consideration or approval of the said Application and petitions the Commission to set the matter for oral presentation before the full Commission.

In support of this request for waiver and petition for oral presentation, Applicant shows to the Commission Exhibits 1, 1a and 5 which are part of the said Application and which are attached hereto and made a part hereof.

The Commission may find that waiver of certain of its general rules and regulations in this case is the most desirable administrative device to grant applicant's request and thus give effect to applicable constitutional limitations and requirements and simultaneously to achieve the purposes of the Commission's allocation policies.

Inasmuch as this appears to be a matter of first impression and in order to facilitate disposition of the said Application, Applicant requests the Commission to set this matter for oral presentation before the full Commission.

This request is filed in accordance with the requirements of §1.566 of the Commission's Rules and Regulations and is made without prejudice to, or waiver of, the constitutional and legal claims set forth in the said Application and the exhibits attached thereto.

Respectfully submitted,

MAURICE ROSENFELD, LOIS F. ROSENFELD,  
HAROLD A. WEISS, ROBERT G. WEISS, and  
DEVOE, SHADUR, MIKVA and PLOTKIN, a co-  
partnership, Applicant.

By *Sh. A. ... P. ...*  
McCOY, MING & BLACK  
123 West Madison Street  
Chicago, Illinois 60602  
FRanklin 2-1106

HARRY KALVEN, JR.  
University of Chicago Law School  
Chicago, Illinois 60637  
MIDway 3-0800

Of Counsel

ARTHUR STAMBLER  
888 Seventeenth St. N.W.  
Washington, D. C.  
298-9100

Attorneys for Applicant.

**GERALD N. SHIELDS***Advertising Agency***1771 WEST AINSLIE ST. CHICAGO 40, ILL.****TELEPHONE SU 4-8390**● **PUBLICATIONS**● **RADIO**● **TELEVISION**

153

Federal Communications Commission  
Washington, D. C.

Gentlemen:

I am taking just a moment to write regarding the application of WAIT for extension of their broadcasting time.

As both a user and listener of radio I know the importance of encouraging the broadcasting of those radio stations that perform not only a commercial benefit, but a benefit to the community as a whole.

WAIT is such a station. There's is the finest AM station broadcasting in the Chicago area.

It is with great sorrow that I am daily forced to turn off the radio in my office because WAIT must leave the air.

Gentlemen, I urge you as a public service to extend WAIT's broadcasting time.

Thank you for your consideration in this matter.

Sincerely,

FORREST C. SHIELDS  
Gerald N. Shields Advertising

March 17, 1967

BROADCAST FACILITIES  
DIVISION  
MAR 22 1967

6521

[154]

March 17, 1967  
5000 East End Avenue  
Chicago, Ill., 60615

Federal Communications Commission  
Washington, D.C.

In re: Radio Station W A I T  
Chicago, Illinois

Gentlemen:

The undersigned has no right, title or interest in subject radio station and is writing merely, as a devoted listener, to request that you give favorable consideration to its application for extended service beyond its normal operating hours.

Some of the reasons prompting this request are as follows:

In this day of loud noise and music (?) and hard sell raucous announcing, this is the only AM Station in Chicago that consistently programs music that is listenable, will not wake the baby and not jar a driver's nerves when he needs all his wits about him on today's expressways.

While there is always FM to turn to to dodge the other AM stations, there is not a single FM station in Chicago that programs such things as: a 5 minute news headline summary, frequent traffic reports during the morning and evening rush hours and competent and reliable weather information which, incidentally, is far more reliable than that given by the local weather "guessers" on other radio or TV stations.

Not all of us are blessed with FM receivers in our cars, and when WAIT is forced to go off the air shortly after sundown, we are forced to turn off the car radio rather than be subjected to the cacaphony of noise which emanates from the other AM stations.

I can think of nothing more enjoyable than the elimination of the announcement that comes out every evening "... in accordance with FCC regulations we are required to leave the air ..." and it is urgently hoped that your office will give favorable consideration to the application to remain on the air in accordance with their request.

Very truly yours,

/s/ B. L. Sloan

[164]

March 21, 1967  
2001 North 77th Avenue  
Elmwood Park, Illinois 60635

Mr. Ross Hyde, Chairman  
Federal Communications Commission  
Washington, D.C.

Dear Mr. Hyde,

A few days ago, my husband and I heard radio station W.A.I.T., Chicago broadcast that they have petitioned the F.C.C. for permission to remain on the air for 24 hours per day. We are writing you at this time to encourage the acceptance of this request.

They are truly dedicated to "the world's most beautiful music." Their selections are always in the best taste. I find them superior to F.M. broadcasting because of their news coverage and community services, and because the selections included a pleasant balance between vocal and instrumental recordings.

We hope our comments are of service to you, and will, perhaps, influence your decision.

Sincerely,

/s/ W. E. Sims

/s/ Mrs. William E. Sims



[Caption Omitted in Printing]

ENCLOSURE FACILITY  
CHICAGO

APR 19 1967

OPPOSITION TO REQUEST FOR WAIVER  
AND PETITION FOR ORAL PRESENTATION

Comes now A.H. Belo Corporation (Belo), licensee of WFAA, 820 kc, Dallas, Texas, and opposes the "Request for Waiver and Petition for Oral Presentation" of Radio Station WAIT (WAIT) for the reasons set out below:

1. WAIT cites Sections 73.21, 73.24, 73.25, 73.182 of the Rules and Regulations of the Commission, as provisions which individually or collectively preclude the grant of the application tendered by WAIT. The reasons advanced to support waiver of the specified rules are in substance arguments against the adoption of, or for a change in, these Rules. In short, they attack the Rules themselves. This is inappropriate to support a waiver of such rules. WAIT also requests waiver of "any other provisions of the said Rules and Regulations or other requirements which might be deemed to bar consideration for approval of said application." It is not surprising that the request does not contain any sufficient justification for waiver of rules which WAIT did not see fit to even specify. One of such rules, Section 73.24(b)(3), clearly requires that the WAIT application be returned without consideration. (See also note following Section 1.571).

2. Entirely apart from the specifically applicable rules and regulations which preclude (a) the consideration of and (b) the granting of the tendered WAIT application, which would be more than sufficient ground to reject it if it involved a frequency other than an unduplicated

clear-channel frequency, the Commission's Clear Channel Report makes it abundantly clear that consideration of nighttime duplication on 820 kc is a matter that should be considered in a rule-making rather than an application context. See Report and Order, Docket 6741, 31 FCC 565, 21RR 1801, particularly the discussion therein (page 1809 et seq) of the resolution of the issues, and specifically paragraph 30 thereof (page 1814) which deals explicitly with 820 kc. The Commission's considered exposition of its views with respect to the question of whether the remaining unduplicated clear-channel frequencies should be utilized for service with "super" power or multiple station use as possible alternative manners of serving the public, leave no room for any doubt that the breakdown proposed by WAIT has been rejected in principle by the Commission as a useful method of providing service on presently unduplicated clear channels. Unless and until the Commission makes a further rule-making determination with respect to the now unduplicated clear channels, any application for nighttime duplication on 820 kc is premature and should not be considered.

### CONCLUSION

WHEREFORE, in view of the foregoing, the Commission should, consonant with its Rules, reject the tendered application of WAIT and refuse to waive its applicable Rules which would provide for consideration

178

of such application at this time. The questions involved herein are neither difficult nor complex and there appears to be no need for oral

argument to dispose of them.

Respectfully submitted,

A.H. BELO CORPORATION

April 17, 1967

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

180

[Caption Omitted in Printing]

OPPOSITION OF CARTER PUBLICATIONS, INC. TO  
REQUEST FOR WAIVER AND PETITION FOR ORAL PRESENTATION

Comes now Carter Publications, Inc. (hereinafter "Carter"), licensee of Radio Station WBAP, Fort Worth, Texas, and opposes the "Request for Waiver and Petition for Oral Presentation" filed March 7, 1967 by Maurice Rosenfield, Lois F. Rosenfield, Harold A. Weiss, Robert G. Weiss, and Devoe, Shadur, Mikva and Plotkin, d/b as WAIT Radio, and respectfully requests that the application be returned to the applicant without action.

I. The Reservation of 820 kc as a Class I-A Channel for Exclusive Use Nighttime Is Lawful, and Serves the Public Interest.

1. The Communications Act of 1934, as amended, requires the Commission to grant broadcasting facilities in the public interest, convenience and necessity, and to distribute broadcast facilities fairly, efficiently and equitably. (Section 307). To effectuate these standards in the field of standard

broadcasting, the Commission has continuously concerned itself with the specific

"objectives of providing (2) some service of satisfactory signal strength to all areas of the country, (b) as many program choices to as many listeners as possible, and (c) service of local origin to as many communities as possible." (Clear Channel Report, 1961, 21 RR 1804.)

Because of the physical behavior of radio signals, the Commission has found it necessary and desirable in the public interest to classify channels in the standard broadcast band

181

in order to achieve its objectives as fully as possible (Ibid.), and to afford different degrees of protection from interference from other stations. (Rule 73.182(v)). As the Petitioner well knew when it acquired Station WAIT in 1962, the frequency 820 kc is reserved at night for unduplicated use in the United States by the licensees of Stations WBAP and WFAA, Fort Worth and Dallas, respectively, on a share-time basis.

2. Contrary to paragraph 17 of Exhibit 1 of the subject application, which is incorporated by reference in the waiver request, the classification of channels as indicated above is in no sense an anachronism. The very Report and Order in Docket 6741 cited in paragraph 17 shows clearly (in its first paragraph) that the Commission had had the matter of its classification of channels under study from 1945; the cited Report was released in 1961. The Commission was, of course,

aware of the phenomenon of directional antennas. Consequently, the matters raised by the subject petition are not concerned with antediluvian concepts which have not been examined by the Commission in recent times.

3. The Petition presents a distorted picture of the Commission's classification and treatment of the frequency 820 kc in the standard broadcast band because of grievous engineering errors, misunderstanding (at least) of the role of programming in the classification of channels in the public interest, and the inability to recognize the significance of the natural limitations or scarcity of the electro-magnetic radio spectrum.

II. The Engineering Basis of the Request for Waiver Is Completely Erroneous.

4. Petitioner's allegations in paragraph 2, 3, 4, and 5 of Exhibit 1 - in fact, the whole technical basis for the waiver request - are erroneous because Petitioner incorrectly

182

understands the Commission's Rules as establishing a protected contour at night on 820 kc. (See the engineering statement attached hereto.) This contour is alleged, through misunderstanding of Exhibit 109 in the Clear Channel Proceeding, to be the 0.5 mv/m 50% skywave contour. It is quite clear that the frequency 820 kc is a Class I-A clear channel which may not be duplicated at night; consequently there is no nighttime protected co-channel contour. In the words of Rule 73.182(v):

"Class I-A stations on channels reserved for the exclusive use of one station during nighttime hours are protected from co-channel interference on that basis."

That the frequency 820 kc is such a Class I-A clear channel is clear from the provisions of Rule 73.25. As a matter of fact, the 1961 Report and Order in Docket 6741 states that 820 kc is one of twelve clear channels which are "reserved for future evaluation" for improvement of skywave service through the authorization of higher power than the present maximum of 50 kilowatts. (Clear Channel Report, Id. at pars. 25-29).

5. The attached Statement of Carter's Engineering Consultant, which is an incorporated part hereof, further destroys the technical basis of the waiver request by demonstrating the error of assuming that WBAP/WFAA does not serve beyond its 0.5 mv/m 50% skywave contour; and the erroneous conclusions of Petitioner with respect to interference to the WBAP/WFAA secondary service area, population, and "white area". While there is no point in repeating here the substance of the attached engineering statement, the Commission's attention is invited to grossly inefficient nature of the WAIT proposal: 80.55% of the area and 30.7% of the population in the normally protected (2.5 mv/m contour) of the proposed operation would not receive service.

183

### III. The Programming Basis of the Request for Waiver is Irrelevant.

6. The subject application and waiver request demonstrate dramatically that the classification of channels for



service to the public should not be based on program proposals. In fact, the record seems to require the conclusion that the applicant's programming proposals and convictions are mere evanescence. Exhibit 5 of the subject application is almost a pious document in its "social consciousness." However, the Commission is invited to the following statements of the applicant in a letter to the Commission dated March 4, 1963, and reaffirmed in the applicant's renewal application (BR-604) executed August 25, 1964:

"\* \* \* radio's ability to cover news in depth is wholly inferior to that of the print media, perhaps also to television as well." (pp. 4-5)

"The audio media could not compete against the visual one in the discussion and educational fields." (p. 5)

"Radio is a background to living, to activity. \* \* \* Radio is used while driving an automobile, while ironing, while giving the kids a bath, while waking up or going to sleep or dressing, and perhaps in more romantic moments." (p. 5)

"\* \* \* then a station serving the public interest has an obligation either to cut down or cut out the talk 1 which kills the audience or is ignored by it and thus falls on deaf ears, to stop any pretense or caricatures of news coverage in length and depth, and even to resist governmental preference for education or discussion which educates no one or is heard by no one. In short, it becomes the station's obligation, if these are its convictions -- as they are ours -- to serve up music in rhythm and patterns that assist and complement normal activities rather than sound which attempts to kidnap the listeners' whole attention by the force of cacaphony. Consider in this connection the difference in the type of listening of concert goers and the radio audience. People who attend concerts listen seriously and intently -- sometimes with musical score in hand. When people are this serious about what they hear in music, they

rather attend concerts in person or listen to their own phonograph records, personally selected. On the other hand, good music via radio is listened to casually, and perceived by the mass of mankind as part of a pleasant environment."  
(p. 5)

181

[1/"Furthermore, enormous changes have occurred in the great metropolitan centers with the development of suburban living, expressways in the principal areas and explosive growth in automobile traffic. It may be that today one of the major functions of radio is to serve the population on wheels on the expressways and highways. This if true has important implications. The audience on wheels moving at high speeds cannot physically listen attentively to discussion, education or for that matter even news and what is more should not. A driver cannot simultaneously listen closely and attentively to talk and drive safely. At this level, if he tries, auto radio is as much a safety hazard as auto TV. This confirms our point that radio listening is casual, a background to activity -- in this case, driving."]

"We believe that the place of WAIT in all of this is to present in the AM spectrum the good sounds of lovely melody -- mature music artfully put together with a relative minimum of talk or chatter or other discussions." (p. 7)

7. The more objective, and less self-serving, facts with respect to radio service in the Chicago area are found at paragraph 12 of the applicant's Exhibit 1: The area is served by more than 25 AM stations and sixteen FM stations.

#### IV. Petitioner's Allegation of Denial of Freedom of Speech Is Erroneous.

8. At paragraph 18 of Exhibit 1, the applicant alleges that the Commission has denied it freedom of speech under the First Amendment of the Constitution, reasoning by analogy:

"It is as though, by governmental action, the Chicago Tribune, a morning paper, was prohibited from selling evening editions, or a magazine by administrative fiat was limited to newsstand sales with circulation by mail denied."

The Supreme Court disposed of this allegation in National Broadcasting Co. v. United States (1942) 319 U.S. 190, 226:

"We come, finally to an appeal to the First Amendment. \* \* \* Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."

9. At paragraph 19 of Exhibit 1, the applicant makes a somewhat more sophisticated allegation, as follows:

185

"Under the circumstances here where the limitation is shown to be greater than is necessary to serve its purpose the administrative action would appear to violate the First Amendment."

The answer to the allegation is that petitioner has been misled with respect to engineering matters, and the "limitation" complained of is appropriate and lawful.

V. The Request for Oral Argument Should Be Denied.

10. Because of the plethora of obvious technical and other errors in the request for waiver of the Commission's Rules, as shown above, it is submitted that oral argument on the subject petition would be unproductive and an inefficient use of the time of the Commission. Contrary to the alleged reason for oral argument, there are no matters of first impression presented by the applicant.

WHEREFORE, Carter respectfully requests that the Commission deny the said "Request for Waiver and Petition for Oral Presentation" and return the application to the applicant.

Respectfully submitted,

CARTER PUBLICATIONS, INC.

By Theodore Baron  
Theodore Baron

Michael Finkelstein  
Michael Finkelstein

SCHARFELD, BECHHOEFER & BARON

Its Attorneys

1710 H Street, N. W.  
Washington, D.C. 20006

April 17, 1967

- 186

ENGINEERING STATEMENT IN BEHALF OF  
CARTER PUBLICATIONS, INC.  
ON APPLICATION OF  
WAIT RADIO, CHICAGO, ILLINOIS  
FOR NIGHTTIME OPERATION

Jules Cohen, being first duly sworn, says that he is a partner in the firm of Jules Cohen & Associates, consulting electronics engineers with offices in Washington, D. C., that he is a professional engineer registered in the District of Columbia and Commonwealth of Virginia, and that his qualifications as an engineering expert are a matter of record with the Federal Communications Commission. In behalf of Carter Publications, Inc., licensee of Radio Station WBAP, Fort Worth, Texas, the engineering exhibit associated with an application tendered by WAIT Radio, Chicago, Illinois, on or about March 7, 1967, has been studied. The instant engineering statement describes the results of that study.

Radio Station WAIT is authorized presently to operate on the frequency 820 kHz with power of five kilowatts from sunrise, Chicago time, to sunset at the location of the WBAP/WFAA transmitter. By the application recently tendered, WAIT proposes to extend operating hours to unlimited time, employing power of ten kilowatts at night, with directional antenna. Pursuant to domestic rules and international treaty, WBAP shares the unduplicated 820 kHz channel with WFAA, Dallas.

In computing the effect on WBAP/WFAA, the engineering exhibit associated with the WAIT application treats the 0.5 mv/m 50% skywave contour as the outer limit of a "normally protected" secondary service area of WBAP/WFAA. Such treatment is inappropriate under Section 73.182 of the Rules and Regulations of the Federal Communications Commission.

187.

Subparagraph (i) of Section 73.182(a)(1) in referring to Class IA stations states that duplicate nighttime operation is not permitted except to the extent provided in Section 73.25(a) and Section 73.22. A reference in the same paragraph to Class I stations being afforded protection nighttime to the 0.5 mv/m 50% skywave contour from stations on the same channel clearly applies only to duplicated Class IA channels.

The table included as Section 73.182(v) sets forth signal intensity contours of areas protected from objectionable interference. Footnote 7 to that table reads, in pertinent part:

"Class IA stations on channels reserved for the exclusive use of one station during nighttime hours are protected from cochannel interference on that basis."

Section 73.25(a) of the Rules designates 820 kHz as an unduplicated channel.

The secondary service area of a Class IA unduplicated station does not stop at the 0.5 mv/m 50% skywave contour. When interference free, signal strength of less than 0.5 mv/m provides satisfactory rural service-- particularly during winter months in the northern part of the country where atmospheric noise levels are low.<sup>1/</sup>

<sup>1/</sup> Section 73.182(f) of the FCC's Rules notes that all rural areas during winter and northern rural area in the summer may be served by signal intensity of 0.1 to 0.5 mv/m. Although the reference is to ground wave, the figures are applicable equally to sky wave, the only difference being that the skywave service is not present 100% of the time.



188

Even if 0.5 mv/m were considered to be the minimum useful field intensity, that level of signal strength is available for percentages of time less than 50% well beyond the 0.5 mv/m 50% skywave contour. Hence, the interference to the WBAP/WFAA secondary service area is far more extensive than indicated on the map of Figure 10 in the WAIT engineering exhibit, and the populations and areas affected would be far greater than the 2,165,502 people and 70,700 square-mile area tabulated in the WAIT application.

Recognition of the fact that the secondary service area of an unduplicated clear channel station is more extensive than the 0.5 mv/m 50% skywave contour negates the statement in the WAIT engineering exhibit that no interference would be caused in a "white area". The proposed operation of WAIT would surely involve interference to the reception of secondary service from WBAP/WFAA in at least the States of South Dakota, North Dakota and Montana. Examination of nighttime primary service analyses submitted in Docket No. 6741 shows that much of that area is without primary nighttime service.

Interference to WBAP/WFAA, in addition to being violative of other Sections of the FCC's Rules, would constitute a failure to comply with Section 73.24(b)(4). The WAIT application is not in compliance with other portions of Section 73.24 as well. WAIT makes no claim that its proposed nighttime operation would provide primary service to any area presently without primary service, nor would it in fact do so. The application is therefore not in compliance with Section 73.24(b)(3) of FCC's Rules.

A further failure to comply with Section 73.24 is with respect to subparagraph (a) of that section. On the basis of population and area analyses submitted as

189

part of the WAIT application, 30.7% of the population and 80.55% of the area in the normally protected (2.5 mv/m) contour of the proposed operation would not receive service.

s/ Jules Cohen

Subscribed and sworn to before me this 12th day of April, 1967.

s/ Inez M. Brooks  
Notary Public, D. C.

My commission expires  
January 31, 1971

(SEAL)

[Certificate of Service Omitted in Printing]

192

[Caption Omitted in Printing]

OPPOSITION TO "REQUEST FOR WAIVER AND  
PETITION FOR ORAL PRESENTATION"

Clear Channel Broadcasting Service (CCBS), by its attorneys and pursuant to Sections 1.41 and 1.587 of the Commission's Rules, hereby submits its opposition to the Request for Waiver and Petition for Oral Presentation filed herein on March 7, 1967 with respect to the above-entitled application which seeks authority to change the hours of operation of WAIT

from limited time to unlimited time on 820 kc,<sup>1/</sup> employing power of 10 kw night and 5 kw day, DA-N. In support thereof, it is stated as follows:

1/ Class I-A Station WBAP, Fort Worth, Texas, shares 820 kc with Class I-A Station WFAA, Dallas, Texas.

## 193

### I. Identity and Interest of CCBS.

1. CCBS, whose origin dates back to 1934, is an informal organization composed of eleven licensees of non-network owned Class I-A Clear Channel stations.<sup>2/</sup>

2. CCBS has actively participated in numerous Commission AM allocation proceedings (including the 1936, 1938 and 1945 Clear Channel Hearings, Dockets 4063, 5072-A and 6741) for the purpose of assisting the Commission in determining ways and means of improving the service rendered by standard broadcast stations so that all, not just some, of the residents of the United States can receive satisfactory (in terms of signal strength) broadcast signals. For far too many years, over 25 million people living in "white" areas have not received even one satisfactory nighttime primary AM service and additional millions living in "gray" areas

2/

#### Frequency (kc)

#### Call Letters and Location

640

KFI, Los Angeles, California

650

WSM, Nashville, Tennessee

700	WLW, Cincinnati, Ohio
720	WGN, Chicago, Illinois
750	WSB, Atlanta, Georgia
760	WJR, Detroit, Michigan
820	WFAA, Dallas, Texas
820	WBAP, Fort Worth, Texas
840	WHAS, Louisville, Kentucky
1040	WHO, Des Moines, Iowa
1160	KSL, Salt Lake City, Utah

## 194

have received but one satisfactory nighttime primary service. It has long been beyond dispute that (1) primary service cannot be afforded to any significant number of the millions of underserved Americans, (2) service can be improved where needed (in rural and remote areas) only by improving skywave service and (3) skywave service can be improved only by preserving the too few existing Class I-A frequencies and authorizing Class I-A stations to operate with power in excess of 50 kw.

## II. The WAIT Waiver Request.

3. WAIT's arguments in support of its request that the Rules violated by its application be waived<sup>3/</sup> may be summarized as follows:

(a) WAIT could operate during nighttime hours on 820 kc without causing any interference to "white" areas within the 0.5 mv/m 50% nighttime skywave contour of WFAA and WBAP.

3/ WAIT requests the Commission "to waive §§73.21, 73.24, 73.25 and 73.182 of the Rules and Regulations of the Commission and any other provisions of said rules and regulations or other requirements which might be deemed to bar consideration or approval of said Application." (Request, p. 2).

(b) The present protection afforded to WFAA and WBAP is "excessive" to the point that it violates the free speech and due process guarantees of the First and Fifth Amendments of the United States Constitution and the confinement of WAIT to limited time operation denies

### 195

it the freedom of speech protected by the First Amendment and results in a "competitive disadvantage to WAIT."

(c) "There is not now a single, locally owned and managed, entirely independent Chicago station authorized to operate at night which seeks to provide radio programs for the Chicago audience generally," and accordingly, WAIT should be permitted to operate nighttime in order to "satisfy the wants of the adult audience in the Chicago area for mature music artfully programmed with a limited amount of talk and chatter, together with serious, in depth discussions of public affairs and educational matters programmed at times of the day and week when an adult audience in the Chicago area could listen to such serious-minded, mature programs."

4. The WAIT waiver request is fatally defective in that it fails to allege any facts which, if assumed to be true, raise a prima facie presumption that a waiver of the rules violated and a grant of its application to operate on 820 kc at night would serve the public interest. U.S. v. Storer Broadcasting Company, 351 U.S. 192 (1956). In substance, WAIT's waiver request is but an untimely petition requesting the Commission to reconsider and overturn its Docket 6741 decision insofar as it retained

820 kc as an unduplicated Class I-A Clear Channel. WAIT asks the Commission to duplicate 820 kc, without any rule making proceeding, in a manner that would not even accord Class I-A stations WFAA and WBAP the protection the Class II-A stations envisioned by the Docket 6741 decision must accord

## 198

to the pertinent duplicated Class I-A Stations (protection to the 0.5 mv/m 50% nighttime skywave contour). Moreover, the WAIT proposed nighttime operation would not provide any primary service to "white" areas; would cause interference to 2,165,502 people residing in an area of 70,700 square miles within the WFAA/WBAP 0.5 mv/m 50% nighttime skywave contour; would cause interference to additional areas and populations beyond the WFAA/WBAP 0.5 mv/m 50% nighttime skywave contour; and would fail to serve 30.7% of the population and 80.5% of the area within its proposed normally protected contour.<sup>4/</sup> A grant of WAIT's inefficient proposal would destroy the present potential of 820 kc for improved service to "white" areas by the use of higher power and at the same time cause interference to millions of people now receiving nighttime skywave service from WFAA and WBAP within and beyond the 0.5 mv/m 50% nighttime skywave contour of WFAA and WBAP. It is difficult to conceive of a proposal which so patently disserves the public interest.



III. The WAIT Application Is in Total Contravention of the Commission's Clear Channel Rules and Policies Adopted in the Docket 6741 Proceeding and Must Be Returned as Unacceptable for Filing.

5. The initial argument advanced in support of the WAIT waiver request is premised on a misreading of the Commission's 1961 Docket 6741 Clear Channel Decision (21 RR 1801 and 24 RR 1595). WAIT

4/ See Engineering Statement of Jules Cohen filed herein on April 17, 1967 by Carter Publications, Inc.

197.

contends, in total oblivion of the nature of the "white" area problem, that its application complies with the spirit of the Commission's Clear Channel policies because its nighttime proposal allegedly would not objectionably interfere with the WFAA/WBAP 0.5 mv/m 50% skywave service to the northwest. WAIT advances the unsound theory "that the policy of the Commission to enable service to 'white' areas is satisfied by protection of the Class I station skywave to the 0.5 mv/m contour." The "white" and "gray" area problem can be solved only by expanding skywave service, not by shrinking present skywave service to the 0.5 mv/m 50% contour produced by power of 50 kw.

6. The Clear Channel Decision in Docket 6741 was the result of a long and complex rule making proceeding designed to find a way to improve AM service to "white" and "gray" areas. Although recognizing that nighttime primary service could not be extended to any significant

portion of the nation's vast "white" areas, the Commission amended its rules so as to look toward authorizing one additional full-time station (within specific geographic locations and subject to providing a first nighttime primary service to either 25% of the nighttime interference-free primary service area or to 25% of the population residing therein) on each of eleven Class I-A Clear Channels.<sup>5/</sup> With respect to these duplicated Class I-A frequencies, the Commission provided that any Class II-A station operating during nighttime hours on those channels would be required to

5/ 670, 720, 780, 880, 890, 1020, 1030, 1100, 1120, 1180 and 1210 kc.  
750 and 760 kc were also duplicated due to treaty problems with Mexico.

### 138

give complete protection against interference to the entire 0.5 mv/m 50% skywave service areas of the "duplicated" Class I-A stations (21 RR at 1819).

7. Conscious of the fact that the 13 contemplated duplications would not in fact solve the "white" area problem,<sup>6/</sup> the Commission preserved the status quo of 12 Class I-A Clear Channels<sup>7/</sup> in order to preserve a potential for curing the "white" area problem through the realization of the benefits of higher power (see Pars. 10, 12, 16, 37 and 85 of the 1961

6/ The envisioned Class II-A stations will provide a first nighttime service to but a handful of the over 25 million "white" area residents.

7/ 640, 650, 660, 700, 770, 820, 830, 940, 870, 1040, 1160 and 1200 kc.  
The Commission's 1962 Memorandum Opinion and Order made it clear that some, if not all, of the 13 "duplicated" Clear Channels should be considered for higher power (Pars. 9, 37 and 38).

Report and Order). After careful consideration of numerous circumstances affecting each channel, the Commission concluded in its 1961 Report and Order (21 RR 1801) that 820 kc was one of the I-A channels best suited to the preservation of possibilities of improving service to "white" areas through utilization of higher power (Par. 30). In its 1962 Memorandum Opinion and Order (24 RR 1595), the Commission emphasized that the "extensive potential" of 820 kc "should be retained pending a final determination on the merits of higher power" (Par. 45). Obviously, a grant of the WAIT application would be totally incompatible with preserving the extensive potential of 820 kc.

### 139

8. Moreover, there is no basis in the Clear Channel Decision or the Rules for WAIT's assumption that the protection of the secondary nighttime service areas of an unduplicated Class I-A Clear Channel station need not be more extensive than the 0.5 mv/m 50% skywave contour. Contrary to WAIT's allegation, <sup>8/</sup> the reference in Section 73.182(a) to Class I stations being afforded protection at night to the 0.5 mv/m 50% skywave contour from stations on the same channel applies only to duplicated Class I-A channels.

Accordingly, the WFAA/WBAP population and areas which would in fact receive

8/ In this connection, WAIT stated as follows: "Section 73.182 of the Rules and Regulations of the Commission prescribes the engineering standards of allocation generally. Section 73.182(a)(1)(i) provides that Class I stations such as WFAA/WBAP shall be provided protection in the nighttime from stations on the same channel to the 0.5 mv/m fifty percent skywave contour. Section 73.182(w) defines the minimum ratio of the field intensity of a desired to an undesired signal for interference free service as 20:1" (Exhibit 1, pp. 2-2a).

interference is greater than the 2,165,502 people residing in an area of 70,700 square miles shown in the WAIT application. Furthermore, based on the nighttime primary service analyses submitted in Docket 6741, the proposed nighttime operation of WAIT would involve interference to the reception of secondary service of WFAA/WEAP in "white" areas located in South Dakota, North Dakota and Montana. A grant of WAIT's application, therefore, would exacerbate rather than ameliorate the "white" and "gray" area problem, a result totally counter to the basic objectives of the Commission's Clear Channel decision.

## 200

### IV. WAIT's Allegations Concerning Violation of the First and Fifth Amendments Are Wholly Without Merit.

9. WAIT next alleges that the present limitation on its use of 820 kc (limited hours) must be eliminated because it: (a) is so "excessive and undue" that it "may be beyond the power of the Commission" (Exhibit 1, p. 4); (b) "contravenes basic American principles and is in violation of both statutory and constitutional limitations on administrative action contained in the Communications Act and the Fifth Amendment to the Constitution of the United States, respectively" (Exhibit 1, p. 8); (c) "places WAIT at a competitive disadvantage in the Chicago market with no compensating advantage to listeners in other areas" (Exhibit 1, p. 4); and (d) "seriously impairs its ability to communicate with its audience so

that [it] is denied the freedom of speech protected by the First Amendment to the Constitution of the United States" (Exhibit 1, p. 8).

10. WAIT's broad brush allegations are patently without merit. WAIT's license confines its operation from sunrise, Chicago time, to sunset at the location of the WFAA/WBAP transmitter due to valid allocation rules duly adopted by the Commission pursuant to authority

## 201

granted it by the Communications Act of 1934. WAIT's license does not expressly or by implication give it a right to serve any particular number of listeners or any particular geographical area at all hours of the day. Indeed, Section 309(h) of the Communications Act specifically provides that a "station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." It is well established that refusal by the Commission to grant an application for new facilities or to renew a license is not a taking of property within the ambit of the Fifth Amendment. See Trinity Methodist Church, Smith v. FRC, 61 App. DC 311, 62 F. 2d 850 (1935).

11. If WAIT's view of the guarantees of the First Amendment is correct, it would, as the Supreme Court has said, ". . . follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of

free speech." NBC v. U.S., 319 U.S. 190, 226 (1943). But, as Mr.

Justice Frankfurter explained in that case:

"Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. . . . The licensing system established by Congress in the Communications Act of 1934, was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience or necessity.' Denial of a station license on that ground, if valid under the Act, is not a denial of free speech." Id. at p. 227.

## 202

12. If WAIT's view is carried to its logical end, we would have to revert to the chaos which existed in 1926, when no federal authority existed to promulgate and enforce allocation rules. In Carter Mountain Transmission Corp. v. FCC, 25 RR 2055, 2060 (1963), the U.S. Court of Appeals pointed to the illogic of WAIT's assertion:

"It may be assumed that any denial of a license to transmit radio or television programs keeps off the air, and hence deprives the public of, the material which the applicant desires to communicate. But that does not mean that the Commission must grant every license which is requested. Nor does it mean that the whole statutory system of regulation is invalid. Quite the contrary is true: a denial of a station license, validly made because the standard of 'public interest, convenience, or necessity' has not been met, is not a denial of free speech."

13. WAIT's allegation that limited time operation places it at a competitive disadvantage with unlimited time stations in the Chicago area



has no bearing on whether it would serve the public interest to waive the rules concerned. Private competitive considerations do not enter into public interest determinations with respect to the Commission's allocation policies. The fact that WAIT may suffer a competitive disadvantage vis-a-vis unlimited time stations is of no consequence since its application does not comply with the public interest allocation standards established by the Commission.

## 203

V. WAIT's Allegations Concerning the Need For its Program Format Do Not Constitute a Proper Basis for Wholesale Waiver of the Commission's Allocation Rules and Policies.

14. WAIT's third allegation in support of its waiver request is that a waiver of the Commission's basic allocation rules and policies is warranted here in order that it may "satisfy the wants of the adult audience in the Chicago area for mature music artfully programmed with a limited amount of talk and chatter, together with serious, in depth discussion of public affairs and educational matters programmed at times of the day and week when an adult audience in the Chicago area could listen to such serious-minded, mature programs" (Exhibit 1, p. 7). In this connection, WAIT alleges that "there is not a single, locally owned and managed, entirely independent Chicago station authorized to operate at night which seeks to provide radio programs for the Chicago audience generally" (Exhibit 1, p. 6). In support of this proposition, WAIT has submitted a

selective analysis<sup>9/</sup> of the comparative programming of Chicago AM stations (Exhibit 5, pp. 4-6).

15. Even assuming, arguendo, the validity of WAIT's program analysis, a programming proposal does not constitute a proper basis for permanent waiver of basic allocation rules and policies of the Commission.

9/ There is no discussion in the WAIT waiver petition of the programming formats of FM stations licensed to serve Chicago.

## 204

The need for a particular format in a given market can and does change from time to time. On the other hand, service and interference factors, governed as they are by the physical laws of nature, are not variable and fluctuating as are the needs of the public for certain types and kinds of programs, and hence are more properly the essential threshold criteria for evaluating whether a particular broadcast proposal is in the public interest.

16. As Commissioner Cox recently stated, an applicant's program proposals, no matter how great the need for the proposed programming, are not an appropriate basis for waiving the Commission's Rules governing the allocation of broadcast facilities. Semrow Broadcasting Co., 7 RR 2d 645, 652 (1966). Commissioner Cox noted:

"Once an allocation is made, it is for all practical purposes permanent - but programming is fleeting: Under the Commission's policies, the licensee is under a duty to ascertain the needs and interests of

the area he serves and to meet those needs. He is expected to change his programming if he finds changing needs and interests. Also, a change in ownership may bring a change in emphasis which, while responsive to certain of the needs and interests of the area, may be completely different from the programming basis upon which an allocation change might have been predicated." Ibid.

## 205

VI. Oral Argument Is Not Needed Since a Determination of the Issues Can Be Made on the Basis of the Pleadings Filed Herein.

17. WAIT requests the Commission to set this matter for oral presentation before the full Commission "[i]nasmuch as this appears to be a matter of first impression and in order to facilitate disposition of the said Application." Contrary to WAIT's allegation, the issues involved herein are not a matter of first impression. Rather, the allocation rules and policies in question have been exhaustively examined by the Commission and its predecessor, the Federal Radio Commission. The only novel aspect of the WAIT proposal is its contravention of so many of the Commission's allocation rules and policies. As demonstrated herein, WAIT has not alleged any facts which, if assumed to be true, raise a prima facie presumption that a grant of its proposal would be in the public interest. Oral argument would, therefore, serve no useful purpose since a determination can be made on the basis of the pleadings filed. Wide Water Broadcasting Co., 24 RR 536 (Rev. Bd., 1962).

WHEREFORE, for the foregoing reasons, the Commission is requested to deny WAIT's request for waiver and petition for oral presentation and return its application as unacceptable for filing pursuant to

206

the Commission's Public Notice (B-11533) released October 27, 1961.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

208

[Caption Omitted in Printing]

OPPOSITION OF MIDWEST RADIO-TELEVISION INC.

Midwest Radio-Television Inc. (WCCO), Minneapolis, Minnesota (hereinafter "Midwest"), by its attorneys, opposes the "Request for Waiver and Petition for Oral Presentation" filed March 7, 1967 by Maurice Rosenfield et al d/b/as WAIT Radio (hereinafter "WAIT"), and in support thereof states as follows:

1. WAIT, Chicago, Illinois has tendered for filing an application to increase facilities on 820 kc. from 5 kw L-WFAA/WBAP to 10 kw fulltime, operating with a directional antenna at night. In an accompanying "Request" and "Petition" it seeks (1) a waiver of Rules which might be deemed to bar "consideration or approval" of the application, and (2) oral presentation of the matter to the Commission en banc. The relief requested should be denied, and the application should be dismissed.

2. WCCO operates as a Class IA station at Minneapolis, Minnesota on 830 kc with 50 kw, non-directionally. It has also tendered an application to operate with 750 kw, with directional antenna at night. Midwest will be adversely affected by the proposed operation of WAIT.

3. WAIT's request for waiver of pertinent Rules to permit consideration of its fulltime proposal is based on (1) the argument that the proposal will achieve the purposes of the Commission's allocation policies, especially those relating to clear channels, and (2) the claim that it is under a competitive disadvantage in the Chicago market resulting from its fluctuating "daytime" hours of operation and there is need in the Chicago area for "mature music" on a fulltime basis. The showing made is completely inadequate to justify the waiver requested.

a) WAIT claims that its fulltime operation as proposed would achieve the purposes of the Commission's allocation policies for standard broadcast stations, by providing an additional nighttime service in the Chicago area without causing interference to WFAA/WBAP's 0.5 mv/m 50% of-the-time skywave service to any white area in the "northwest."

Even if the claim with respect to interference were true (WFAA/WBAB presently serves and with super-power would serve many other areas than that "northwest" of Dallas/Fort Worth, and interference would be caused to its skywave service in areas both beyond and other than those admitted), it is insufficient to justify a breakdown of a clear channel. A dominant station

on a clear channel such as WFAA/WBAP, is presently "designed to render primary and secondary service over an extended area and at relatively long distances" (Rule 73.21(a)(1)) to provide service not merely to "white areas", but certainly also to other areas where primary service is deficient.

Moreover, any evaluation of the merit of the waiver request must encompass not only the nature and extent of the service lost, but also the need for the service to be gained. If there is one place whose need for additional service is minimal, it is in metropolitan Chicago, where, as WAIT states, there are already more than 25 AM stations and 16 FM stations (Request, par. 12).

The present request does not meet the threshold requirement of Rule 73.24(b) that 25% of its night service area be "white" area (or even any of the other recognized high-priority tests for needed service (2nd primary service, 1st local service etc.) prescribed for assignments which are within the Commission's allocation rules. A fortiori, therefore, must a proposal which requires a basic modification in one of the Commission's prime allocation rules be subject to dismissal.

b) WAIT claims, however, that its competitive disadvantage from restricted and fluctuating hours and the need for a fulltime "mature music" service in the Chicago area justify the basic change in allocation policy which a grant of its proposal would represent.



The daytime and fluctuating hours of operation of which WAIT complains are inherent in the allocation policies the Commission has adopted for the benefit of the whole country, particularly the underserved portions, as contrasted with the benefit of those areas like Chicago which are already almost surfeited with service; these characteristics are not only applicable to many other daytime or limited time stations on clear channels with comparable arguments for special treatment, but were applicable at the time the present owners acquired WAIT.

Even if the need WAIT alleges exists for "mature music" programming in Chicago, it can hardly compensate for the loss in service in underserved areas or the major breach in standard broadcast allocation policy which the WAIT proposal would produce. Moreover, allocation policy obviously cannot be based upon such transitory and subjective considerations as particular programming needs of an area at a particular time or the specific program proposals of a particular station owner.

The Request for Waiver has made an insufficient showing and should be denied. The application should be dismissed.

4. No need for the unusual procedure of "oral presentation" to the Commission has been established. The pleadings filed by WAIT presumably make the best case it can and can be relied upon to assess the merit of the waiver request.

May 10, 1967

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

REPLY OF WAIT RADIO TO THE OPPOSITIONS

---

WAIT Radio by its attorneys replies as follows to the oppositions heretofore filed by Carter Publications, Inc. (WBAP), A. H. Belco Corporation (WFAA), Clear Channel Broadcasting Service (CCBS), and Midwest Radio-Television, Inc. (WCCO):

215

1. Contrary to the assertions in all of the oppositions, WAIT Radio does not in this proceeding attack the "clear channel" doctrine or policy of the FCC or urge reconsideration or revision of the "clear channel" rules designed to effectuate that policy. On the contrary, WAIT explicitly recognizes the Commission's commitment to its long-standing "clear channel" policy and asks only for a waiver of the rules effectuating that policy as they apply to this case. The basis for the WAIT request is a point apparently of first impression to the FCC, to wit, that under the circumstances of this particular case, technology now makes possible nighttime co-existence

of WAIT on a clear channel (820 kc) without conflict in any way with the policies underlying the "clear channel" rules.

2. Use of its power of waiver of rules and regulations of general applicability to meet the needs of specific situations may well be the most effective

216

regulatory tool of the Commission. To deny its use in connection with problems such as the use of "clear channels" which have plagued the Commission for many years would indeed hamper and hinder the Commission's regulation to no useful purpose.

It is astonishing that our opponents should in this proceeding, but not in others, confuse the difference between rule-making and waiver. For example, in File No. BALCT-283, etc., counsel for CCBS have heretofore themselves filed a request for waiver from the TV multiple ownership rules of the FCC on behalf of WGN of Colorado, Inc., and petitioned for oral presentation of that request -- a procedure exactly parallel to that here. It can hardly be their point that the only rules and regulations of the FCC

not subject to the Commission's long-established waiver practice are the "clear channel" rules and that these alone remain sacrosanct from waiver.

3. The "clear channel" policy and the rules effectuating it have a clear-cut regulatory purpose or

217

objective. That purpose is not to create a few strong and paramount facilities on certain prime radio frequencies as things desirable in and of themselves. Nor is the purpose to discipline the industry by silencing some stations at night.

The "clear channel" doctrine and the related rules mean that some, or all but one, of the stations on a selected frequency will be silenced at night so as to enable the remaining station or stations on the channel so cleared to radiate via unobstructed nighttime skywave into remote areas too thinly populated to support local radio stations serving such areas with a primary or groundwave signal.

(See In the Matter of Clear Channel Broadcasting, etc., Docket No. 6741, 21 RR 1801, 1805-6). The regulatory purpose is thus to provide some kind of

a service to areas which otherwise would have nothing at all. These areas have been characterized as "white" areas. The theory is that to provide something

218

better than nothing in the "white" areas through skywave ranks higher on the scale of comparative values than an additional groundwave of the silenced station in a given metropolitan area, even though the groundwave signal so lost is of excellent quality and a skywave is inevitably erratic. The thesis is that it is worth the sacrifice of an additional groundwave in some places to get a skywave signal into the "white" areas. The regulatory purpose in other words is clearly to benefit the "white" areas, not to benefit the stations for whose signal the channel has been cleared.

4. We have shown that in this particular case and on this particular frequency, 820 kc, our proposed directional antenna makes possible the achievement of the same objective, namely radiating an unobstructed skywave service from Texas to the "white" areas, with a partial instead of a total silencing of WAIT at night. Because of the mileage separation between the transmitters

of the Texas stations and WAIT and their relative geographic positions, WAIT could provide a superb additional signal to the Chicago area at night through a directional antenna array without obstructing in any way the skywave service of the Texas stations to the "white" areas located within the 0.5 mv/m 50% skywave contour of the Texas stations.

As our Engineering Statement shows, through a four-tower in line directional system, erected on a tract southwest of Chicago and acquired at a land cost in excess of \$400,000, WAIT can limit any and all interference or obstruction within the 0.5 mv/m 50% skywave contour of the Texas stations to a territorial crescent 100% served via groundwave from local stations. In short, the full policy objective of preserving 820 kc as a "clear channel" can be achieved without gratuitously throwing away a superb additional groundwave service at night in the Chicago area. In light of the Congressional mandate that radio communication services be "efficient"

(see 47 U.S.C. §151), maximizing the use of available radio frequency resources to avoid their waste is in



the public interest as well as is utilizing them to provide some service for as many people as possible.

5. Inasmuch as in their statements of opposition our opponents have overlooked, ignored, or confused the fact that WAIT seeks a waiver, not rule-making or re-consideration of the "clear channel" policy of the FCC, it is not surprising that they similarly misunderstand our constitutional points. We of course do not urge that allocation of radio frequencies, as such, violates the First Amendment. Accordingly, NBC v. U.S., 319 U.S. 190 (1943), relied upon by them, has no application at all to this case. Nor do we contend that silencing the speech of some stations at night by FCC rule per se violates the First Amendment.

What WAIT does urge is that totally silencing its speech at night when a partial silencing through a nighttime directional would just as effectively achieve

221

the Commission's policy amounts to the excessive use of regulatory power which the Supreme Court characterized as "over-breadth" and so severely condemned in Shelton v. Tucker, 364 U.S. 479,

488-489 (1960), and Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967).

In the latter case, quoting with approval from the Shelton case, the Supreme Court observed:

"But 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" (Emphasis added.)

Again, also in Keyishian, the Supreme Court pointed out:

"We must emphasize once again that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms' N.A.A.C.P. v. Button, 371 U.S. 415, 338; 'For standards of permissible statutory vagueness are strict in the area of free expression.... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' Id., at 432-433." (Emphasis added).

222

Radio, like the other mass communication media, is as sensitive a resource of freedom as the classroom and social reform organization, and radio is equally part of the "market place of ideas." Accordingly,

radio like other means of communication requires, and under the First Amendment is entitled to, basic protection against excess or "over-breadth" in the use of regulatory power.

Indeed, it would appear that the FCC seeks to avoid excessive regulation and "over-breadth". In a sense this has even been recognized by CCBS. Of the eleven member licensees catalogued by CCBS at page 2 of its opposition here, at least five share their channels with stations in Hawaii, Alaska and San Diego with Commission approval and yet remain members of CCBS. The Hawaiian and Alaskan stations operate non-directionally, but the San Diego station which co-exists on 760 kc with both WJR at Detroit and KGU at Hawaii uses a directional antenna at night. A nighttime directional antenna

223

system for WAIT of the kind proposed would produce an identical relationship between WAIT and WFAA/WBAP on 820 kc in the sense that there would be no obstruction to the skywave service of the Texas stations in any "white" area. A refusal to permit co-existence under these circumstances deprives WAIT of rights secured to it by the Constitution. As has been

observed, the purpose of clearing a channel is to benefit "white" areas, not any particular station for which a channel is cleared. Accordingly, we urge further that if co-existence is not permitted under the circumstances here, the Constitution may require rotation or sharing of the "clear channel" privileges among all stations licensed on a particular frequency by analogy to the equal opportunities to speak provided under Roberts Rules of Order.

Since a limitation on the use of its property by WAIT is involved, we suggest that the Fifth as well as the First Amendment is violated by excessive or "over-breadth" regulation.

224

6. Our opponents seek support for their case by emphasizing the vast geographical areas in the United States served only by skywave with a population in such areas exceeding 25,000,000 people. They seek to commingle "white" and "gray" areas (the latter a characterization of their own recent invention) and thus confuse three separate things. One is the service to "white" areas within the 0.5 mv/m 50% skywave contour of WFAA/WBAP.

Another is the availability of their skywave signal to the non-"white" areas within that contour. The third is the possibility of reception of that skywave signal on occasion in areas beyond the most distant limits of that contour.

It is essential both to an analysis of Commission policy and to achievement of the precision which the First Amendment requires of governmental regulation in this subject matter that these three aspects of the matter be kept separate. As we have

## 225

already shown, the service of WFAA/WEAP to the "white" areas within their 0.5 mv/m 50% skywave contour would not be interfered with or affected in any way by WAIT's directional co-existence with them on 820 kc. Whatever service WFAA/WBAP now renders to those "white" areas, they would continue to render under our proposal as well and this engineering point remains unchallenged.

We turn therefore to an analysis of the other two aspects.

A. The skywave signal in non-"white" areas.

Unable to point to any threat of impairment of their service in any "white" area, our opponents scramble to discover a totally new justification for the "clear channel" rules. They argue that the "clear channel" policy underwrites total protection of their skywave in areas adequately served by ground-wave of other stations. No evidence is offered by

226

them, nor can there be, that any of the people who receive groundwave service from one or more local, regional or Class I stations are in need of, rely upon, or in fact ever listen to the skywave signal from Texas.

Moreover, as the Commission's rules and regulations recognize, the radio audience, and the Commission, always prefer primary groundwave service to an intrinsically erratic skywave signal. Reflecting the historic position of the FCC staff, the FCC's then Chairman at the time of the last "clear channel" order reported to Congress:



"Moreover, the service which would be rendered by these stations would be local in character, able to provide the local news and weather, public issues, and other material of special interest to the people of the service area. As has been brought out in earlier sessions, 1-A stations, while likely in many instances presenting programming of high quality and interest, simply cannot fill the needs of their vast skywave service areas for broadcast material of local significance. This fact, I believe, operates along with the technical limitations of skywave service to cut down the extent to which listeners at far distant points rely on Class I stations."

227

Clearly, the objective of the "clear channel" policy is to silence some stations at night so that the skywave signal will go unobstructed into "white areas, not to provide multiple choices between skywave signals and groundwave signals in non-"white" areas. The latter cannot be a subsidiary purpose of the "clear channel" policy for it would involve an irrational preference for multiple services in some non-"white" areas as compared with multiple services in other non-"white" areas. For example, the cities of Peoria and Louisville are among the larger cities located in the non-"white" interference crescent where WAIT's proposed nighttime service

would conflict with the skywave of the Texas stations. The claim of our opponents that the "clear channel" policy protects the WFAA/WBAP skywave in non-"white" areas

228

would mean that an additional skywave service from Texas into those cities -- both of which are well served with local primary services -- ranks higher on the scale of comparative values than an additional full-time service in Chicago. Or put another way, our opponents argue that an additional service via a poor skywave signal at that, to the 2,200,000 people in the interference crescent necessarily serves the public interest better than an additional groundwave service to the 7,000,000 people in the Chicago area. The Commission itself, of course, has never sought to justify the "clear channel" policy on any such basis.

B. White areas beyond the outer limits of the 0.5 mv/m 50% skywave contour.

Our opponents further distort the purpose of the "clear channel" policy in their opposition to our proposals. They urge that the skywave protection

of a Class I or "clear channel" station is not limited to its 0.5 mv/m 50% skywave contour and

229

that a signal as poor as that within a 0.1 mv/m 50% skywave contour is worthy of protection.

In this connection the attention of the Commission is called to Section 73.182(a) (1) (i) which provides:

"The Class I stations in Group I-A are those assigned to the channels allocated by §73.25(a), on which, except to the extent provided by that section and by §73.22, duplicate nighttime operation is not permitted. The power of these stations shall not be less than 50 kilowatts. The Class I stations in this group are afforded protection as follows:

\* \* \*

"Nighttime: To the 0.5 mv/m 50 percent skywave contour from stations on the same channel, and to the 0.5 mv/m groundwave contour from stations on adjacent channels." (Emphasis added.)

In addition, the attention of the Commission is called to its own observations in the Clear Channel Report, 21 RR 1801, 1809 (par.16).

Our opponents' claim that a signal intensity

of 0.1 mv/m can be considered as adequate under the FCC rules is based wholly on Section 73.182(f). But that section is patently limited to groundwaves and is by its very terms wholly and utterly inapplicable to skywaves.

Interestingly, in their efforts to secure protection of the WFAA/WBAP signal beyond the 0.5 mv/m 50% contour, our opponents make no showing whatever that the "white" areas beyond that contour, such as in North and South Dakota and Montana, do not fall within the 0.5 mv/m 50% contour of one or more other stations.

7. Another point involved in the objections is that our proposal for co-existence on 820 kc

would violate Section 73.24(b)(3)<sup>1/</sup>. That section requires that an applicant for a new nighttime facility show 25% "white" area coverage. But we have requested a waiver of

---

<sup>1/</sup>Section 73.24(i) is also cited by them. That section applies only to specified frequencies of which 820 kc is not one. Accordingly, that section is not applicable here.

that rule as well as the "clear channel" rules. In this connection it should be noted that the policy underlying rule 73.24(b)(3) is apparently to conserve unused radio frequency resources to meet "white" area service needs. But in the case of 820 kc, no application for new facilities of any type or location is authorized irrespective of whether or not it would meet "white" area needs. Thus Section 73.24(b)(3)—upon analysis

### 232

turns out as applied to 820 kc to be merely an indirect restatement of the "clear channel" rule itself. The case for waiver of Section 73.24(b)(3) here, therefore, is identical to the showing we make for waiver of the "clear channel" rule itself.

Moreover, Section 73.24(b)(3), if not waivable, comes close to a Commission determination that no additional nighttime service may ever be provided to any metropolitan area in the United States irrespective of the circumstances. Thus the effect of Section 73.24(b)(3) is to insulate all present nighttime licensees in metropolitan areas from additional competition, not necessarily to

utilize facilities and resources to meet "white" area needs. This administrative freezing of the status quo is itself a species of the "over-breadth," or excess of regulation, condemned by the Supreme Court.

## 233

8. WCCO urges that grant of the requested waiver would interfere with a possible decision by the Commission that certain American stations should be given authority to operate with power in excess of 50,000 kw. There is nothing in the WAIT request for waiver, however, that would in any wise, if it were granted, interfere with "super-power." Indeed, as WAIT has endeavored to make clear from the very beginning in its petition rejected by the Commission on or about February 4, 1966, WAIT recognizes and conforms its request to the fact that:

"In docket No. 6741, the Commission reserved for further study the question of the use of 'clear channels' for super-power. Accordingly, WAIT hereby limits this petition to request authority for nighttime operation only so long as the Commission does not determine that operation will interfere with such use of super-power on 820 kc/s as the Commission might find to be in the public interest."



... In order to allay any concern on the part of WCCO or any other "clear channel" station, WAIT repeats here and now its position that any waiver which the Commission may see fit to grant may be made subject to whatever future decisions the Commission may make with respect to the use of "superpower" in the public interest on 820 kc/s.

In any event, WCCO appears to be in a particularly poor position to object in this case. WCCO broadcasts on 830 kc and there is no evidence that there would be any interference, objectionable or otherwise, to WCCO resulting from the grant of WAIT's request, even if WCCO were ever to be given permission to operate with 750 kw.

Furthermore, WCCO is part of a corporate complex which includes ownership of the only two

Minneapolis daily newspapers, a national news magazine and a principal VHF television station in Minneapolis. The radio station of this complex boasts in its trade advertising that it enjoys the largest audience concentration in any

one city in the history of broadcasting; in fact that it holds the all-time record for a major market domination by a single AM station. (See Standard Rate and Data, August 1, 1966, p. 434.)

The attempt by WCCO to prevent the Commission from assuring WAIT its constitutional rights in order for this corporate complex to expand its domination of mass communications through the use of superpower seems to be a peculiarly inappropriate confusion of private goals with public interest.

## 236

9. We have made three basic and important engineering claims here, to wit:

1) Our proposed directional antenna array would provide an excellent additional groundwave service to Chicago, which would meet all Commission standards and rules with respect to coverage of that city.

2) We would cause no interference to the WFAA/WBAP skywave in any "white" area within their 0.5 mv/m 50% skywave contour.

3) All objectionable interference to the WFAA/WBAP skywave could fall within a territorial crescent 100% served by adequate groundwave signal of one or more local stations.

These engineering showings on this record are unchallenged. Thus the issue in this case is entirely one of policy -- whether the "clear channel" doctrine should be extended to protect a skywave in areas adequately served by groundwave, or to protect a skywave beyond the outer limits of the 0.5 mv/m 50% contour at the sacrifice of additional ground-wave service to 7,000,000 residents of the Chicago

237

area. Moreover, this is a policy issue which deeply implicates constitutional considerations. It is this issue of policy which we submit warrants hearing en banc by the full Commission.

#### CONCLUSION

For all of the foregoing reasons as well as those set forth in its Request for Waiver and Petition

for Oral Presentation, WAIT respectfully urges the  
Commission to grant its request and petition.

Respectfully submitted,

Radio Station WAIT, Applicant

By William R. Ming Jr.  
McCOY, MING & BLACK  
123 West Madison Street  
Chicago, Illinois 60602

HARRY KALVEN, JR.  
University of Chicago Law School  
Chicago, Illinois 60637

Of Counsel

ARTHUR STAMBLER  
1737 De Sales Street  
Suite 302  
Washington, D. C. 20554

[Certificate of Service Omitted in Printing]

000241

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 67-1174

6603

In re Application of

Maurice Rosenfield, Lois F. Rosenfield,  
Harold A. Weiss, Robert G. Weiss, and  
Devco, Shadur, Mikva and Plotkin, a Co-  
Partnership d/b as WAIT RADIO  
Chicago, Illinois

Has: 820kc, 5kw, L-SS, Dallas, Texas  
Requests: 820kc, 10kw, 5kw-LS, DA-N, U

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 1967 Released: October 30, 1967

By the Commission: Commissioner Bartley absent.

1. The Commission has before it for consideration the above-captioned application, as amended, which the applicant (WAIT) tendered for filing on March 7, 1967, with a "Request for Waiver and Petition for Oral Presentation", and pleadings in opposition and response.

2. WAIT seeks authority to extend its hours of operation from limited time to unlimited time on 820kc, with a nighttime power (directionalized) of 10kw. This channel is one of the Class I unduplicated clear channels assigned under Section 73.25 of the Commission's Rules. The licensees of Stations WRAP and WFAA, Fort Worth/Dallas, conducting a share-time operation on the channel, have filed opposition on the basis that under the Commission's Rules Class I-A stations on channels reserved for the exclusive use of one station during nighttime hours are protected from co-channel interference (Section 73.162(v)). Other grounds of opposition, as stated by Clear Channel Broadcasting Service (CCBS), are that the WAIT proposed nighttime operation would not provide any primary service to "white" areas; would cause interference to 2,165,502 people residing in an area of 70,700 square miles within the WFAA/WRAP 0.5 mv/m-50% nighttime skywave contour; and would fail to serve 30.7% of the population and 80.5% of the area within its proposed normally protected contour.

3. The applicant states that by the use of its proposed directional antenna it could conduct a nighttime operation without objectionably interfering with the WFAA/WRAP skywave service to any "white" area within the protected contour. WAIT concedes that the proposal would cause interference

BEST COPY  
from the original

242 as defined by Section 73.24(b)(3) 1/ and thus requests a waiver of this as well as Sections 73.21, 73.25 and 73.182 of the rules (clear channel sections).

4. According to CCPS, WAIT asks the Commission to duplicate 820kc, without any rule making proceeding, in a manner that would not even accord Class I-A stations WFAA and WBAP the protection that Class II-A stations envisioned by the Docket 6741 decision 2/ must accord to the pertinent duplicated Class I-A stations (protection of the 0.5 mv/m-50% skywave contour). Opposition comments also point out that a grant of the proposal would destroy the present potential of 820kc for improved service to "white" areas by the use of higher power 3/ and at the same time cause interference to millions of people now receiving nighttime skywave service from WFAA and WBAP within and beyond the 0.5 mv/m-50% nighttime skywave contour of WFAA and WBAP.

5. The applicant, while acknowledging the Commission's commitment to its long standing Clear Channel policy, argues that it could provide a superb additional signal to the Chicago area at night and a program service which it alleges is not now provided by any of the Chicago stations through a directional antenna array without obstructing in any way the skywave service of the Texas stations to the "white" areas located within the 0.5 mv/m-50% skywave contour of the Texas stations, and that a refusal to permit co-existence under these circumstances deprives WAIT of rights secured to it by the Constitution. 4/ Also, in response to opposition of Station WCCO (830kc), applicant repeats its position that any waiver which the Commission may see fit to grant may be made subject to whatever future decisions the Commission may make with respect to the use of "super-power" in the public interest on 820kc.

---

1/ Based on WAIT's Exhibit 1a, the proposal would cause prohibited interference to an area approximately 850 miles long and 150 miles deep at its center, or what the applicant describes as "a territorial crescent 100% served via groundwave from local stations." Also, the proposal would not satisfy the "25% white area" requirements of this section.

2/ In the Matter of Clear Channel Broadcasting in the Standard Broadcast Band (FCC 61-1106, 31 FCC 565, 21 RR 1801), released September 14, 1961.

3/ In our Memorandum Opinion and Order in Docket 6741 (FCC 62-1214, 24 RR 1595), released November 28, 1962, in para. 45 relating to the 820kc channel we stated that its extensive potential (as an unduplicated clear channel) should be retained pending a final determination on the merits of higher power. At the present time, eight proposals by Class I-A stations for temporary (developmental) operation with power in the order of 500 or 750 kilowatts have been tendered but not accepted for filing. Also tendered are several petitions for and against "super-power" operation and a request that the rules be amended to permit power in excess of 50 kilowatts on the AM band.

4/ WAIT suggests that since a limitation on the use of its property is involved here, the Fifth as well as the First Amendment is violated by excessive or "over-breadth" regulation, citing Shelton v. Tucker, 364 U.S. 479, 483-489 (1960) and Keyishian v. Board of Regents, 385 U.S. 509 (1967). The applicant also states that this excessive limitation on the use of the 820kc channel deprives the listening audience in the Chicago area of additional radio service....and places WAIT at a competitive disadvantage to listeners in other areas, and suggests that the limitation may be beyond the power of the Commission.



243

6. On the basis of the applicant's statement that it does not attack the Clear Channel doctrine or policy of the Commission or urge reconsideration or revision of the Clear Channel rules, it is difficult to perceive a possible legal basis for the requested action in view of the clear and acknowledged violation of Sections 73.21, 73.25 and 73.182 of the Rules, which establish the so-called Clear Channels and the technical specifications for their use. Furthermore, the proposal is a patent violation of both the spirit and the letter of the interference and "white area" provisions of Section 73.24(b)(3), and indeed strikingly exemplifies the kind of situation and area which is the subject of the Commission's concern over the nighttime congestion in the AM band. (Chicago itself has 25 AM and 16 FM stations serving the general area.)

7. Although having stated that it does not attack the clear channel policy or urge revision of these rules, applicant asserts that the present limitation of the nighttime use of the 620kc channel is substantially in excess of any limitation necessary by Commission standards to assure service by WPAW/WBAP to the "white" area in the northwest. Indeed, this would seem to be the very foundation of applicant's position. In addition to challenging these rules as "over-breadth" regulation and violative of the First and Fifth Amendments, 5/ applicant argues that this is depriving the listeners in the Chicago area of a type of radio service -- i.e., non-specialized programming by an independently owned station -- that no other Chicago station is providing. Whether or not this is the case, it is not a sufficient basis for waiving the Commission's Rules governing the allocation of broadcast facilities. Furthermore, since the applicant has failed to set forth reasons sufficient, if true, to justify waiver, there is no need to conduct a hearing. United States v. Storer Broadcasting Company, 351 U.S. 192, 13 RR 2161 (1956); Oregon Radio, Inc., FCC 56-1133, 14 RR 742 (1956); In re Application of 560 Broadcasting Corporation, FCC 66-1121, 5 FCC 2d 886 (1956).

In view of the foregoing, the Commission finds that the applicant has not presented facts which would justify the requested action. Accordingly, IT IS ORDERED, That the applicant's Request for Waiver and Petition for Oral Presentation IS DENIED, and the application IS RETURNED as unacceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple  
Secretary

5/ The Commission's authority in this area is too well established to merit further discussion. See NBC v. U.S., 319 U.S. 190, 226 (1943), Carter Mountain Transmission Corp. v. FCC, 375 U.S. 951, 116 U.S. App. D.C. 93, 321 F2d 359, 25 RR 2055, 2060 (1963), and numerous other authorities.

\*\*\*

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20025

RECEIVED

NOV 29 1967

IN THE MATTER  
OF

RADIO STATION WAIT

F. C. C.  
OFFICE OF THE SECRETARY

NOV 30 1967

Docket No.

242m-10

List B

Bk

Orig + 19

11-29-67

PETITION FOR RECONSIDERATION OF MEMORANDUM  
OPINION AND ORDER RELEASED OCTOBER 30, 1967

DEVORE, SHADUR, MIKVA & PLOTKIN  
208 South La Salle Street  
Chicago, Illinois 60604  
ANdover 3-3700

HARRY KALVEN, JR.  
University of Chicago  
Law School  
Chicago, Illinois 60637  
Midway 3-0800

Of Counsel

Attorneys for Applicant.

ARTHUR STAMBLER  
888 Seventeenth St., N.W.  
Washington, D. C.  
298-9100

Before The  
FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20025

---

IN THE MATTER

OF

RADIO STATION WAIT

)  
)  
)  
)

Docket No.

PETITION FOR RECONSIDERATION OF MEMORANDUM  
OPINION AND ORDER RELEASED OCTOBER 30, 1967

---

Now comes WAIT RADIO, a co-partnership herein-  
after called "Applicant", operator of AM Radio Station  
WAIT, a daytime station operating on 820 kc/s in Chicago,  
Illinois, and respectfully requests reconsideration of  
the memorandum opinion and order released by the Commission  
on October 30, 1967. In support of such petition, Applicant  
states as follows:

1. On March 6, 1967, Applicant filed its  
application for authority to operate at night and simul-  
taneously filed its request for waiver of certain rules  
and a petition for oral presentation on its application  
and request. Accompanying such application, request and

207

petition were various exhibits as well as engineering data which Applicant maintained supported its position.

2. Various oppositions to such request for waiver and petition for oral presentation were filed and subsequent thereto Applicant filed its reply to the oppositions.

3. As the memorandum opinion and order points out, Applicant seeks authority to extend its hours of operation from limited time to unlimited time on 820 kc/s with a directionalized nighttime power of 10 kw. The Commission denied the request for waiver and petition for oral presentation and returned the application as unacceptable for filing.

4. The engineering data accompanying the application shows that Applicant can provide a directionalized service for nighttime broadcasting to the Chicago area which will cause no interference whatsoever to any white areas within the 0.5 mv/m 50% skywave contour. The only interference within that contour will be in the crescent shaped area set forth on the overlay to Exhibit 1-A of Form 301 filed with the application. As we will show below, that crescent area has extensive alternative radio services available, and neither uses, nor is served by, the skywave signal of WFAA/WBAP.

5. The question presented by the Commission's denial of the request for waiver is whether the "clear channel" rules can be used to deny a primary ground wave service which will extend an additional radio service to a

245

a market containing over 7,000,000 people in order to avoid interference to a skywave in an area where the people living in the area have superior services available via ground waves and FM stations (as well as via other skywave services), where the people in fact do not use the skywave service for which protection is sought, and where the stations claiming such skywave protection have made no pretense of serving the area or of claiming a market within the area. To say that the rules should not be waived in such circumstances is to say that the rules have no relation to the purposes for which the regulatory authority of the Commission was established. We respectfully submit that if the rules are so automatically applied to deny the instant application then the rules are inconsistent with the statutory purposes of as well as the constitutional limitations on the Commission.<sup>1/</sup> It is for this reason that a request for waiver of the rules is proper, in order to avoid "overbreadth" of the rules.

The Commission's rules governing the allocation of broadcast facilities by statute (and indeed Constitution) are predicated on promoting the public interest of the listening

---

<sup>1/</sup> In our request for waiver we pointed out the serious constitutional problems that would be raised if the statute is so construed as to permit the rules to be applied in this manner. That question need not be reached if the statute is in fact construed in accordance with its terms and prior judicial interpretations.

public "in the larger and more effective use of radio....

The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." (National Broadcasting Co. v. United States, 319 US 190, 216 (1942)). The regulatory authority therefore must pertain to real instances and real considerations and cannot be used to promote smaller and less effective use of radio. The doctrine of waiver implies that there will be some instances where the rigid application of a rule will not further this public interest. "Overbreadth" of regulation by the Commission comes about when a rule is so applied as to deny radio service to some portion of the listening audience even though such denial is not required to protect the radio service of any other portion of the listening public or the legitimate interest of any other licensee. This is the instant case.

6. Attached to this petition as Exhibit 1 is engineering data and various maps showing the radio services available in the affected areas. Figure 4 of Exhibit 1 is a map showing that every portion of that crescent is serviced by one or more "primary" ground wave stations for nighttime audiences. Figure 5 is a map of the crescent



250

showing that perhaps 90% of the land area of the crescent (and perhaps 90% of the population of the crescent area) is served by two or more "primary" ground waves. Figure 6 of the engineering statement attached to this petition shows the FM station coverage throughout the area and the crescent area on the map makes it clear that 99% of that crescent area is served by one or more FM stations. Indeed, pp. 5, 6 and 7 of the engineering statement attached to this petition, listing the existing FM stations within the crescent, show that some 91 stations were operating as of October 2, 1967, excluding the 10 watt educational stations. In addition, there is all of the FM service provided by stations located outside the crescent area but whose reception range would include portions of the crescent.

7. It should be emphasized that the services detailed on the above described maps all relate to broadcast signals vastly superior to the skywave service which the Commission's order claims to protect. In addition to these "primary" ground wave services and FM services, Figure 1 of

the engineering exhibit attached to this petition shows that a large number of skywave signals reach the crescent area through existing class 1-A and class 1-B stations, all within the normal protected contour of those stations. What these maps in effect show is that not only is the crescent area not a white area but in fact is being serviced by a vast number of radio stations with a signal superior to WFAA/WBAP skywave signal as well as a substantial number of skywave signals equal or superior to WFAA/WBAP's signal. The Commission in its memorandum opinion and order noted that Chicago itself has 25 AM and 16 FM stations serving the general Chicago area. We respectfully submit that the maps above referred to make it clear that the services available to the crescent area are substantially in excess of those available to the Chicago area. Even more important, when the number of available services in each of the areas is related to the population of each of the areas, it becomes clear that the population of the crescent area has a "larger and more effective use of radio" than the population in the Chicago area.

8. Most important, the request for waiver of the rules does not ask the Commission to choose one set of listeners over another set of listeners. The Commission's

252

opinion and order suggests that interference would be caused to some 2,165,502 people residing within the crescent area. The maps referred to, and what has been said about them, make it clear that all of those people have superior radio service available to them via "primary" ground wave service and FM service. It should come as no surprise, therefore, that the people within this crescent area use this superior service rather than the sometimes skywave service offered by WFAA/WBAP. Applicant has requested the American Research Bureau, one of the leading audience measurement services for the broadcasting industry, to report on WFAA/WBAP audiences in this crescent area as reflected in its existing computerized data. It should be emphasized that this report is not a new "survey" of such audience taken for the purposes of this petition. Rather it is a report on the continuous data which the Bureau regularly provides in the normal course of business. The results of this report show that the WFAA/WBAP audience within the crescent area falls far below the minimum reporting standards - so infinitesimal as to be statistically non-existent.<sup>2/</sup> The report is attached to this petition as

---

2/ The American Research Bureau uses the "diary" system of measurement whereby a scientifically selected random sample of listeners keep logs as to the different radio services used by them on a continuous basis. The report shows that out of the 2,917 diaries kept within the crescent area only one showed the use of WFAA/WBAP's radio service. Compare this with applicant WAIT's rating which shows that out of 2,327 diaries kept in the Chicago area as many as 328 use WAIT's radio service.

252

## Exhibit 5.

The report only confirms what WFAA/WBAP have acknowledged publicly for a long time. Attached to this petition as Exhibits 2 and 3 are trade journal advertisements of WFAA in which WFAA describes its market generally as the "Dallas - Fort Worth area" and in no instances reaching beyond southern Oklahoma. (It should be emphasized that the crescent in which interference will occur to the WFAA/WBAP skywave comes nowhere near Texas or Oklahoma.) Exhibit 4 is a brochure put out by Station WBAP showing the extent of its farm service and market, again as the Fort Worth - Dallas area, other portions of Texas and southern Oklahoma. We have used the farm market brochure because one of the assumptions too readily made about skywave service is that it provides needed farm information to rural areas. If that is so, it is clear that WBAP does not consider its farm market to extend beyond southern Oklahoma. Once again, the American Research Bureau's report makes it clear that within the crescent area there is no measurable audience for WBAP either of

farmers or anyone else.

9. An examination of the programming policies of WFAA and WBAP (as set forth in their Statements of Program Service and accompanying exhibits, filed with the Commission in 1965) further confirms that the crescent area is not treated as a part of their listening public. Thus, the public service programming of WBAP orients around local government in the Fort Worth - Dallas area. Local high school football games and local minor league baseball games are part of their programming. The same is true of WFAA. During the evening rush hours, WFAA devotes extensive time to traffic reports in the local area. This programming is clearly not designed to appeal to people living in Iowa, Illinois, Missouri or Kentucky. The above is not intended as criticism of the programming policies of WFAA or WBAP. Licensees ought properly to gear their programming policies to the needs of their listening public. The programming merely confirms what has been established by the Bureau's report, by WFAA's and WBAP's own definition of their market and by common sense; the people within the crescent area, having alternative and superior services available to them, as shown by the maps referred to above, do not rely on the

255

skywave service of WFAA and WBAP for any part of their needs.<sup>3/</sup>

10. The oppositions to the application and request for waiver suggest that the skywave should be protected not only to the 0.5 contour but to the 0.1 contour as well. What has been said above about the listening audience within the 0.5 contour, the programming and the market claims applies with even greater force to the area that much further away from the Dallas - Fort Worth locations of WFAA/WBAP. Moreover, figures 2 and 3 of Exhibit 1 attached to this petition are maps showing that within the 0.1 contour there are a tremendous number of alternative and superior services to the skywave signal of WFAA/WBAP.

---

3/ WFAA/WBAP and CCBS claim an audience size of 25 million persons in white areas to the WFAA/WBAP skywaves. No evidence or proof has ever been given by them or demanded by the FCC with respect to the real size of the listening audience to these skywaves. It is axiomatic that there is a general correlation between audience size and commercial rates, and therefore the commercial rates of WFAA/WBAP during skywave periods should necessarily reflect the enormous amplification by skywaves of their audience size. An examination of any of the monthly issues of Spot Radio Rates and Data (the rate bible of the radio industry which is published by Standard Rate and Data) makes clear the complete invalidity of the claim. The WFAA/WBAP rates are no higher but rather in most cases substantially lower than those of Dallas and Fort Worth local stations whose audience potentials contain no skywave components. Furthermore, WFAA/WBAP rates do not rise during the time when skywave service is on but in fact decline during skywave periods as compared with non-skywave periods. Moreover, during morning and afternoon drive-time, the period universally recognized as radio's prime time, the WFAA/WBAP rate schedules remain uniform as between winter, when skywave service is on and summer when the skywave service is non-existent. If the claim of this gigantic audience was in fact a valid one the audience potential during skywave periods of WFAA/WBAP would far exceed the audience potentials of New York and Los Angeles local stations during the same time periods but the time rates for WFAA/WBAP during skywave hours are far, far below those of either New York or Los Angeles local stations for the same time periods. We would suggest that the claim as to skywave audience can best be characterized as irresponsible.

256

11. Applicant stated in its initial request that it did not seek a modification of the "clear channel" rules. There are undoubtedly many instances where these rules in fact protect portions of the listening public from destruction of a needed and used skywave service. This is not the case in the instant application and request. Application of the clear channel rules under the facts of this case deny an additional radio service to an ever growing market without affording protection to any other market or to any legitimate interest of the licensee involved. Unless the doctrine of waiver is used to ameliorate such a ridiculous result, the rules are being applied for their own glorification and flout the very purposes of and limitations on the Commission's regulatory authority.

12. The population of this country continues to gravitate more and more toward the urban areas. A rigid application of the clear channel rules of the Commission in effect establishes a freeze as to any increase of radio service in such urban areas. Each time the Commission applies these rules without regard to the consequences, the Commission in effect is saying that more people are going to have to get by with less radio service, not even to protect the



smaller populations residing in the rural areas, but simply to protect the rigidity of the rule. The very existence of the doctrine of waiver suggests that this should not and cannot be the result within the framework of the statute authorizing the Commission to act.

13. For all of the above reasons Applicant respectfully requests reconsideration of the Commission's memorandum opinion and order and urges that the application be accepted for filing and the request for waiver and petition for oral presentation be granted.

Respectfully submitted,

RADIO STATION WAIT, a co-partnership,  
Applicant.

By *Allen A. Mikva*

DEVOR, SHADUR, MIKVA & PLOTKIN  
208 South La Salle Street  
Chicago, Illinois 60602  
ANDover 3-3700

HARRY KALVEN, JR.  
University of Chicago Law School  
Chicago, Illinois 60637  
Midway 3-0800

Of Counsel

ARTHUR STAMBLER  
888 Seventeenth St. N.W.  
Washington, D. C.  
298-9100

Attorneys for Applicant

258

KEAN, SKLOM &amp; STEPHENS CO.

RIVERSIDE, ILLINOIS

RECEIVED

NOV 28 1967

F. C. C.  
OFFICE OF THE SECRETARY

## ENGINEERING STATEMENT FOR

RADIO STATION W A I T

CHICAGO, ILLINOIS

NOVEMBER, 1967

Walter F. Kean  
Walter F. Kean, P. E.Date Mar 24, 1967

BEST COPY

from the original

KEAN, SKLOM &amp; STEPHENS CO.

RIVERSIDE, ILLINOIS

ENGINEERING STATEMENT FOR  
RADIO STATION W A I T  
CHICAGO, ILLINOIS  
NOVEMBER, 1967

NOV 28 1967

F. C. C.  
OFFICE OF THE SECRETARY

This engineering statement has been prepared for WAIT Radio, licensee of Radio Station WAIT, Chicago, Illinois. At present, WAIT operates on 820 kc., 5.0 kilowatts power, employing a non-directional antenna, Limited Time.

On March 6, 1967 WAIT filed an application for authority to operate additionally with 10.0 kilowatts power, directional antenna, on 820 kc., at a separate site during nighttime hours. This proposed nighttime operation would create a "WAIT to WFAA/WBAP INTERFERENCE AREA", shown on Figures 1, 4, 5 & 6 herewith.

It is the purpose of this statement to demonstrate the quantity and quality of existing aural radio service in that interference area, and in the area between the WFAA/WBAP 0.5 and 0.1 mv/m 50% time skywave contours.

The skywave contours on the attached maps were computed in accordance with FCC Rules, Section 73.182 using FCC Official List radiations for non-directional stations and Licensed radiation patterns of directional antennas. The appropriate skywave propagation curves were applied to their respective classes of stations. The groundwave contours were calculated as directed by Section 73.183 using the same FCC source information for radiations, and Figure M3 conductivities. Proof conductivities are available in limited directions, so the

values shown in Figure M3 were used because of the wide areas and long distances involved. Had measured conductivities been employed, there would have been no significant differences in the locations of the contours.

Figure 1 On this map are shown the "WAIT to WFAA/WBAP INTERFERENCE AREA" and the existing Class I-A and I-B 0.5 mv/m 50% time contours which enclose or intersect it. The following analysis demonstrates the number of skywave services existing in the area:

Number of-		
Class I-A 0.5 mv/m or greater	Max. = 20*	Min. = 7**
Class I-B 0.5 mv/m or greater	Max. = 9*	Min. = 2***
Combined	Max. = 20*	Min. = 13**
* Vicinity of Louisville, Ky.		
** Vicinity of Mitchell, S. D.		
*** Vicinity of Sigourney, Iowa		

Figures 2 & 3 On these maps are shown the area of the United States which lies between the 0.5 and 0.1 mv/m 50% time skywave contours, and the existing Class I-A and Class I-B 0.5 mv/m 50% time contours which penetrate it. Two maps were used for this showing because there are so many skywave service contours involved that the presentation on one map would be confused. The following tabulation shows the number of skywave services existing in the area:

Number of-		
Class I-A 0.5 mv/m or greater	Max. = 20	Min. = 1*
Class I-B 0.5 mv/m or greater	Max. = 16	Min. = 1*
Combined	Max. = 30**	Min. = 2*
* Vicinity of Helena, Mont. and Miami, Fla.		
** Vicinity of Marietta, Ohio		

Figure 4 This map shows the "WAIT to WFAA/WBAP INTERFERENCE AREA" which is the same as shown in the Application Engineering

Exhibit, Figure 10, with additional detail showing by hatching the location therein of wide area primary groundwave services numbering from one up to six. This does not indicate the service areas therein provided by small radius, local, Class II, III or IV stations.

Figure 5 Within the "WAIT to WFAA/WBAP INTERFERENCE AREA" are shown the locations where only one wide area primary groundwave service, 0.5 mv/m or greater, exists:

- Area A - Vicinity of Mitchell, S.D. receives six I-B plus nine I-A 0.5 mv/m 50% time or greater skywave services
- Area B - Vicinity of Ashton, Iowa receives six I-B plus eleven I-A skywave signals
- Area C - Vicinity of Estherville, Iowa receives six I-B plus twelve I-A skywave signals
- Area D - Vicinity of Washington, Iowa to Jerseyville, Ill. receives at least three I-B plus fifteen I-A skywave services
- Area E - Vicinity of Salem, Ill. to Robinson, Ill. to Evansville, Ind. receives at least five I-B plus eighteen I-A skywave services

Figure 6 This map of the United States prepared by the National Association of Broadcasters, Engineering Department showing the extent of Rural FM Service existing at its publication date. Upon this map is placed the "WAIT to WFAA/WBAP INTERFERENCE AREA" to demonstrate how much of that area receives one or more FM radio services. It is estimated that 99% of the area receives FM services in addition to the primary groundwave services and the secondary skywave services, listed above. As of October 2, 1967 there were 91 FM Broadcast Stations not including 10 watt Class D, licensed or authorized at locations within the area. Attached hereto is a table listing those stations.

KEAN, SKLOM &amp; STEPHENS CO.

RIVERSIDE, ILLINOIS

## EXISTING FM STATIONS IN

"WAIT TO WFAA"  
INTERFERENCE CRESCENT

The following list is based upon FCC records as of October 2, 1967. It does not include 10 watt, Class D educational stations.

State	City	Station
Illinois	Bloomington	WBNQ
	Champaign-Urbana	WDWS
		WLRW
		WILL
		WPGU
		WTWC
	Charleston	WEIC
	Danville	WDAN
	Decatur	WSOY
	Dixon	WIXN
	Effingham	WCRA
	Galesburg	WGIL
	Greenville	WCOR
	Jacksonville	WLDS
	Kewanee	WKEI
	LaSalle	WLPO
	Lawrenceville	WAKO
	Litchfield	WSMI
	Macomb	WKAI
		WWKS
	Mattoon	WLBH
	Mendota	WGLC
	Monmouth	WVPC
	Mt. Carmel	WSAB
	Olney	WSEI
	Ottawa	WOLI
	Paris	WPRS
	Pekin	WSIV
	Peoria	WIVC
		WMBD
	Robinson	WTAY
	Rock Island	WHEF
	Springfield	WFMB
		WVEM
		WTAX
	Sterling	WJVM
	Streator	WIZZ
	Watseka	WGFA

BEST COPY

from the original

KEAN, SKLOM &amp; STEPHENS CO.

RIVERSIDE, ILLINOIS

State	City	Station
Indiana	Bloomington	WFIU
		WITV
	Booneville	WBNL
	Evansville	WIKY
		WPSR
		WVHI
		WEVC
	Greencastle	WXTA
		WGRE
	Jasper	WITZ
	New Albany	WNAS
	Princeton	WRAY
	Salem	WSLM
	Scottsburg	WMPI
	Terre Haute	WBOW
		WISU
		WPFR
		WTHI
		WVTS
	Vincennes	WAOV
Kentucky	Washington	WFML
	West Terre Haute	WWVR
	Fort Knox	WSAC
	Leitchfield	WMTL
	Louisville	WFPK
		WFPL
		WHAS
		WKLO
		WKRX
		WXEL
Iowa	St. Matthews	WSTM
	Burlington	KBUR
	Cedar Rapids	KHAK
		WMT
	Clarion	KRIT
	Clinton	KROS
	Davenport	KWNT
		WOC
	Dubuque	KFMD
		WDBQ
	Iowa City	KXIC
		WSUI
	Iowa Falls	KIFG
	Marshalltown	KFJB
	Mason City	KLSS
	Maquoketa	KMAQ
	Muscatine	KWPC



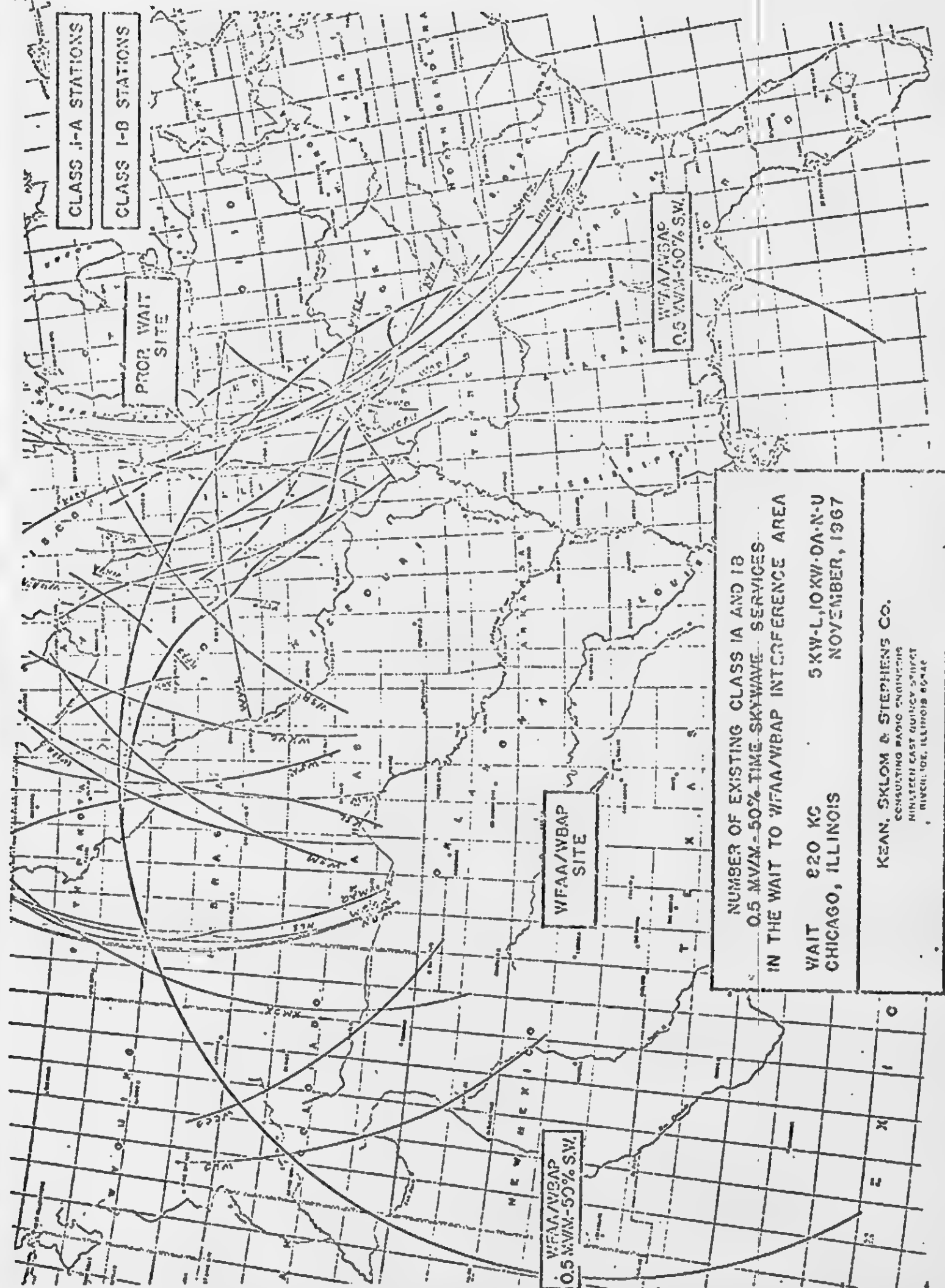
264

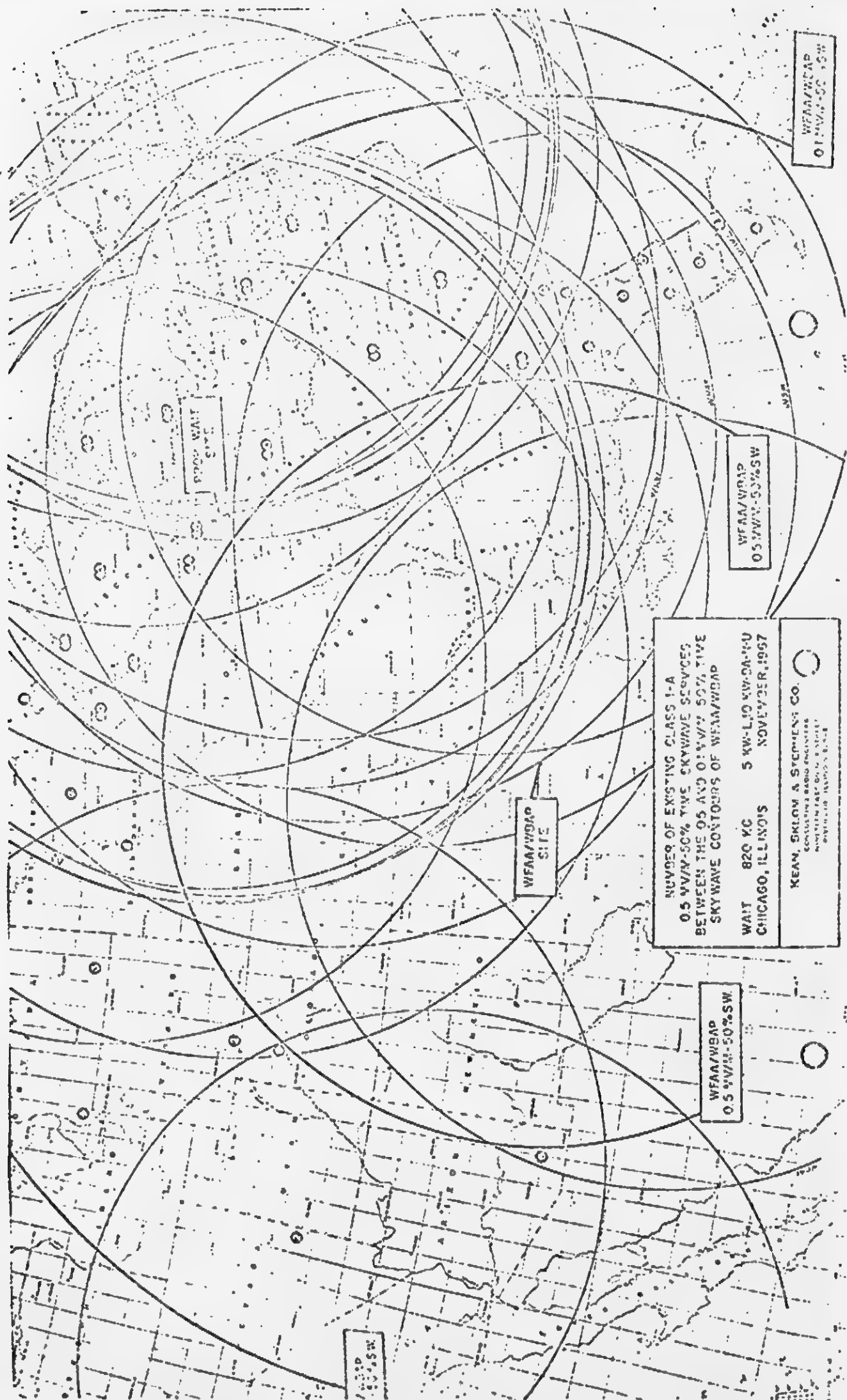
KEAN, SKLOM &amp; STEPHENS CO.

RIVERSIDE, ILLINOIS

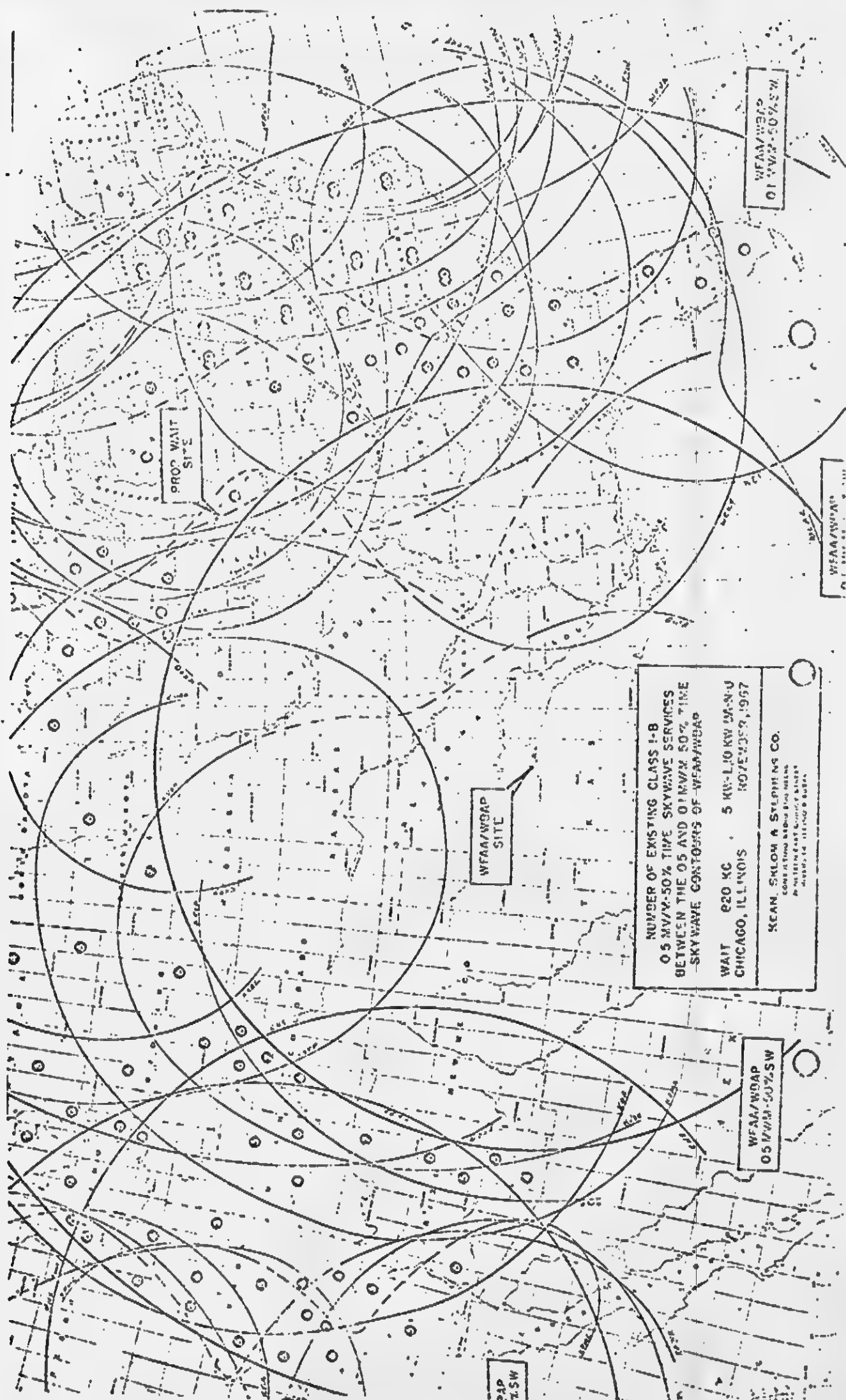
State	City	Station
Iowa	Spencer	KICD
	Waterloo	KNWS
		KWWL
		KXEL
South Dakota	Sioux Falls	KELO
Minnesota	Worthington	KWOA

Total = 91 stations

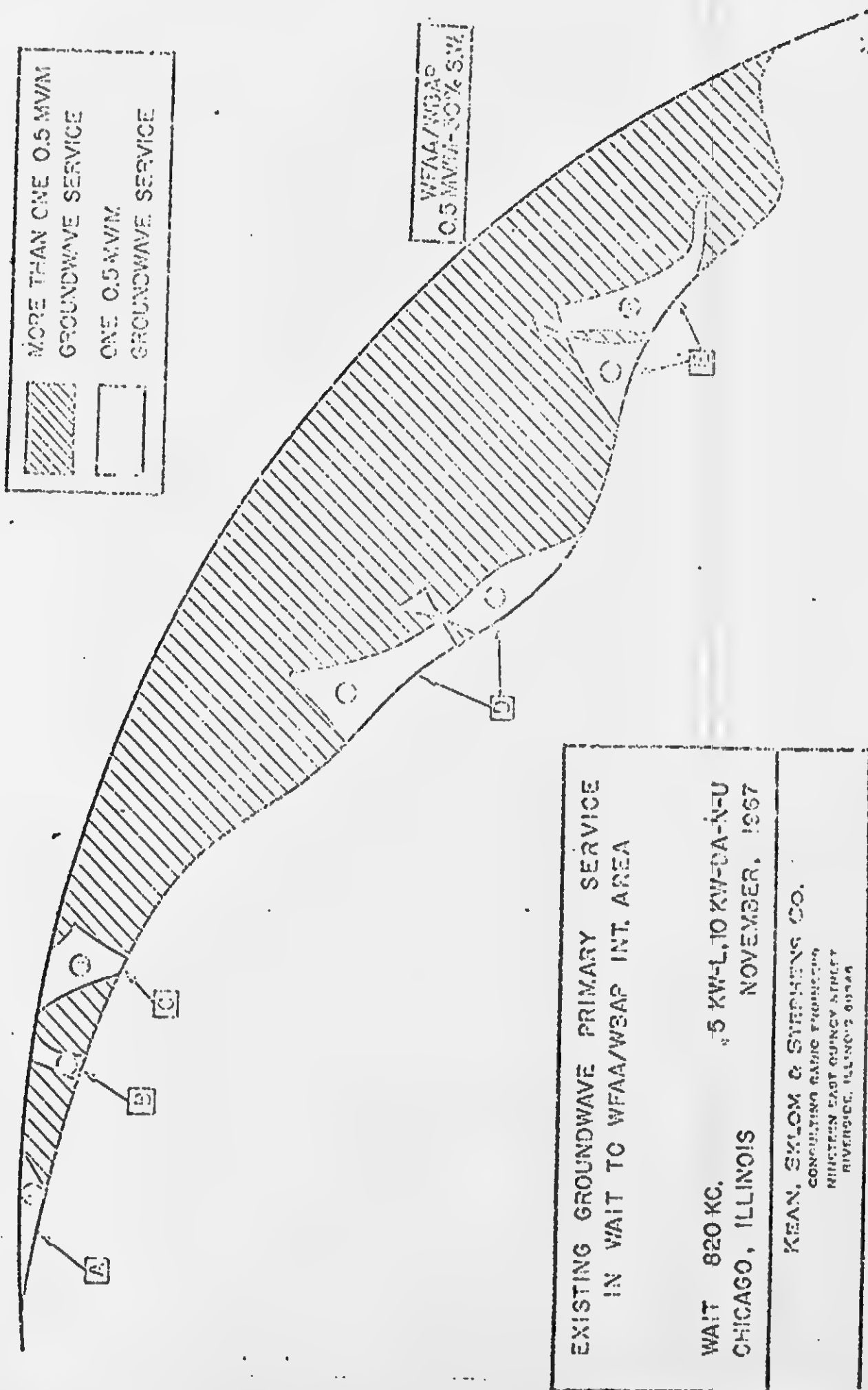




**BEST COPY**  
from the original













271

State of Illinois)  
 County of Cook ) ss

Walter F. Kean, being first duly sworn upon his oath,  
 deposes and says that:

- 1) He is President of the firm of Kean, Sklom and Stephens co., Consulting Radio Engineers, 19 East Quincy Street, Riverside, Illinois, which has been retained by WAIT Radio, licensee of Radio Station WAIT, Chicago, Illinois, to prepare the foregoing engineering statement.
- 2) His qualifications as a consulting radio engineer have been presented to the Federal Communications Commission in Hearing, have been accepted, and are a matter of record.
- 3) The foregoing calculation, statements and exhibits were prepared by him or under his direction and he believes them to be correct. The facts stated are true of his own knowledge except those which are stated to be on information or belief, and he believes them to be true.

Walter F. Kean  
 Walter F. Kean, Affiant

Subscribed and sworn to before me this 24<sup>th</sup> day of November, 1967

Monis Johnson  
 Notary Public

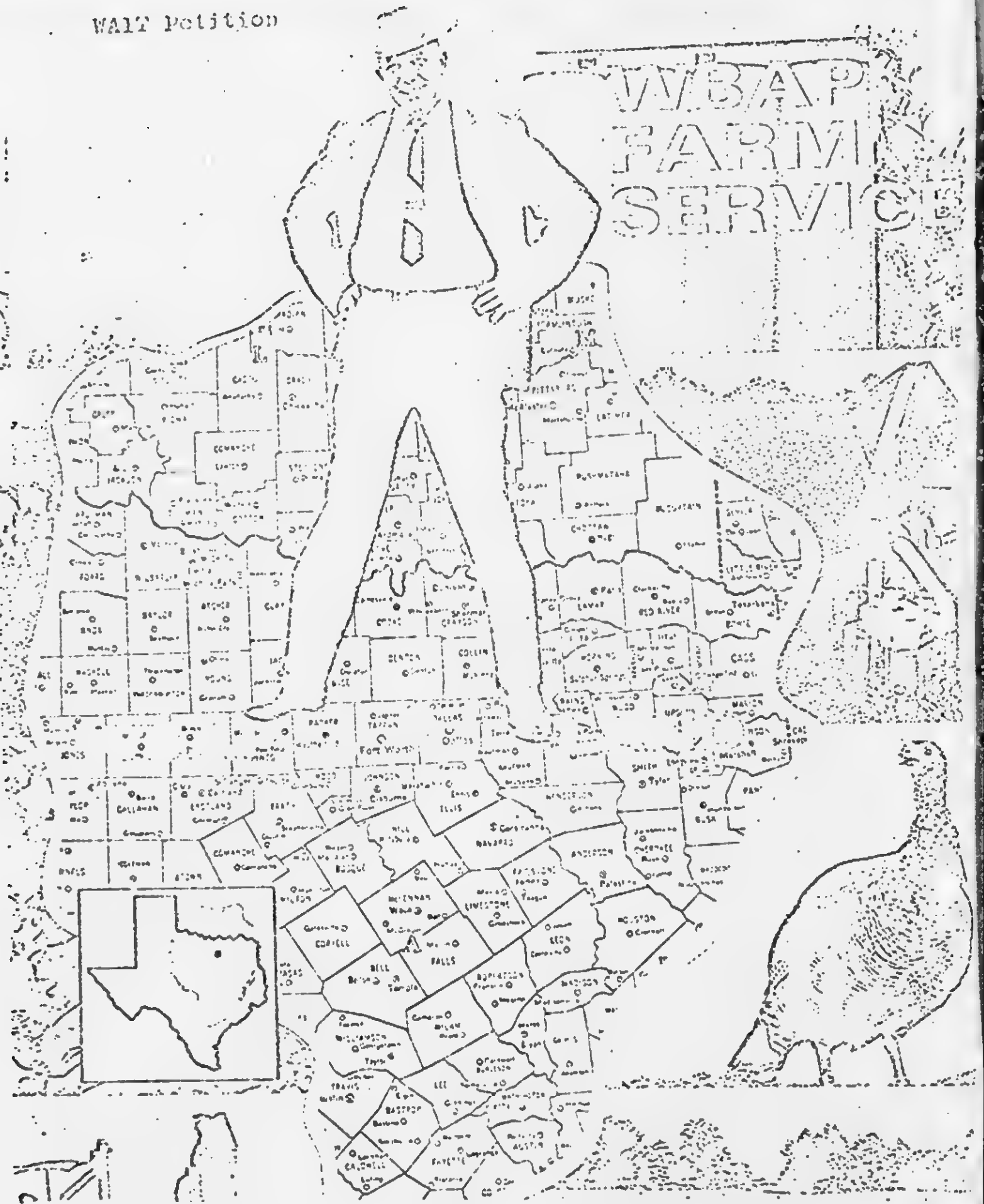
My commission expires 1-18-68





276

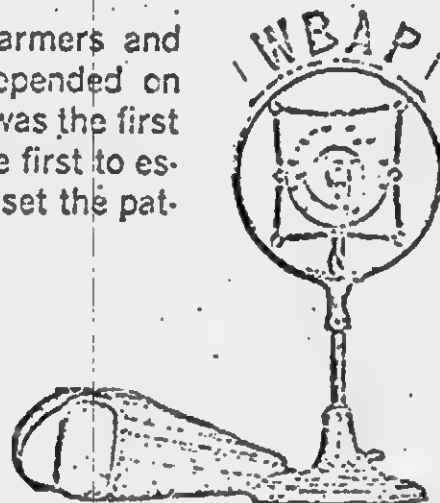
WALT Petition



## WBAP...a Pioneer Farm Station

Since 1922, Radio Station WBAP has been programmed for the farmers and ranchers of Texas and Southern Oklahoma. These listeners have depended on WBAP to keep them informed on news, weather and markets. WBAP was the first station in the Southwest to broadcast livestock market reports and the first to establish a full time Farm Department. Layne Beaty and "Doc" Ruhmann set the pattern on WBAP for farm broadcasting in the Southwest.

WBAP facilities insure a Big Reach. With a power of 50,000 watts and a clear channel frequency (one of 23 in the nation), WBAP serves a coverage area of 174 counties.



### FARM SERVICE DEPARTMENT

WBAP Farm Service Department includes a full time Farm Director, Bob Walsh. He is on the air six days per week with programs, short features and special events.

The Farm Director's broadcasting duties are completed by 7:00 A.M. each morning, but his day has just begun. He drives more than 30,000 miles per year gathering farm news, observing crop conditions, talking to farm leaders, interviewing cattlemen, visiting 4-H Clubs and FFA groups, and attending scores of luncheons, dinners and just plain meetings.

The Farm Director maintains close contact with his sponsors and follows through with additional service where requested. He is available for dealer calls, for sales meetings and to assist with merchandising.

### FARM PROGRAMS on WBAP-820

"Farmer's Almanac"—5:30-5:55 AM, Monday thru Saturday  
A program of music, news and information. Along with wake-up music, Gene O'Bannon and Bob Walsh broadcast headline news, weather reports, farm tips, and a calendar of events.

"News"—5:55-6:00 AM, Monday thru Friday  
6:25-6:30 AM, Monday thru Saturday

Frank Lee reports the morning news every half-hour. These 5-minute newscasts include the top stories of the morning—local, state and national. Also included are sport scores and the weather forecast.

"Farm & Ranch Report"—6:00-6:25 AM, Monday thru Saturday

A complete roundup of agricultural news and information edited and broadcast by Farm Director Bob Walsh. The program format includes farm headlines, a feature story or inter-





view, a complete weather report, a calendar of agricultural events, and is concluded with a livestock and poultry market report from USDA. Crop conditions, insect infestation reports, lawn-and-garden tips, and other special reports are included as time permits.

## WBAP FARM MARKET DATA\*

The 174-county coverage area served by WBAP is an area of widely diversified agriculture which includes:

Total Number of Farms .....	214,768
Acreage in Farms .....	71,645,410
Average size Farm .....	458
Value of Land and Buildings, per Farm .....	\$33,109

In Texas alone, WBAP reaches farmers and ranchers who

- ... plant 45% of the state's cotton allotment
- ... plant 27% of Texas' grain sorghums
- ... raise 57% of cattle and calves in the state
- ... own 75% of the milk cows in Texas
- ... raise 60% of the state's chickens, including broilers

\*1959 Census of Agriculture



## ADVANTAGES OF USING WBAP FARM RADIO

1. WBAP-820 is the dominant radio station in North Texas during early morning hours.
2. Bob Walsh, Frank Lee, and Gene O'Bannon are friends of the family — breakfast companions for thousands of families.
3. WBAP's morning farm programs come closest to the "point of sale". Farmers purchase more feed, seed, and equipment in the morning hours than at any other time of the day.
4. WBAP's Farm Service Department provides "extra services" for program sponsors . . . merchandising assistance . . . dealer calls . . . and product exclusivity.
5. WBAP Radio provides the best means of delivering a sales message to the farm and ranch families of the Southwest.

# WBAP FARM SERVICE DEPARTMENT

Radio Station WBAP, 3900 Barnett St., P. O. Box 1780, Fort Worth, Texas 76101

Phone JE 6-1981 (Fort Worth) AN 4-2484 (Dallas)

Farm Director

Bob Walsh

Director of Radio Sales

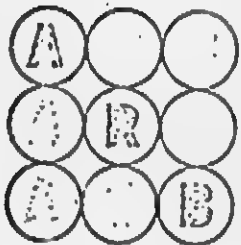
Herman K. Clark

Station Manager

Roy I. Bacus

PETERS, GRIFFIN, WOODWARD, INC., Exclusive National Representatives

WAIT Petition.



AMERICAN RESEARCH BUREAU  
1912 Tribune Tower, Chicago, Illinois 60611/312 • 467-5750

November 27, 1967

WAIT Radio  
679 North Michigan Avenue  
Chicago, Illinois 60611

Attn: Mr. Maurice Rosenfield  
Managing Partner

Gentlemen:

You have heretofore furnished us with a map, which bears the heading WAIT Exhibit 1A, dated 2/10/67. That map has an overlay showing a crescent-shaped area. You have asked us to render a report to you on the listening audience within the crescent shown on that map as reflected in the audience surveys we have heretofore conducted in our 28 sampling units which fall within the crescent. For this purpose we used the data derived from our most recent survey, to wit, April/May, 1967. Within these 28 sampling units, some 2917 diaries were analyzed. Of the 2917 diaries so analyzed, only one diary mentions any listening to WFAA/WBAP. If these 2917 diaries were to be treated as measuring a single radio market, the one diary mentioned would be considerably below our published minimum reporting standards.



Secondly, a tabulation of the total Chicago survey area for the same survey period revealed the following mentions of WAIT:

	<u># of Sample Unit</u>	<u>Tabulated Diaries</u>	<u>Diaries Mentioned Listening to WAIT</u>
Metro Area	8	2,377	328
Total Survey Area	25	4,416	428

If there are any questions, please do not hesitate to contact us.

Cordially,

AMERICAN RESEARCH BUREAU

*E. Norman Larson*

E. Norman Larson  
Account Executive

ENL:dh

[Certificate of Service Omitted in Printing]

[281]

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

RECEIVED

DEC 28 1967

OFFICE OF THE SECRETARY

In re Application of

Maurice Rosenfield, Lois F. Rosenfield  
Harold A. Weiss, Robert G. Weiss, and  
Devoc, Shadur, Mikva and Plotkin, a Co-  
Partnership d/b as WAIT RADIO  
Chicago, Illinois

Has: 820 kc, 5kw, L-SS, Dallas, Texas  
Requests: 820 kc, 10kw, 5kw-LS, DA-N, U

For Construction Permit

To: The Commission

OPPOSITION OF CARTER PUBLICATIONS, INC.  
TO PETITION FOR RECONSIDERATION

Carter Publications, Inc., licensee of Station WBAP, Fort Worth, Texas, herewith opposes the "Petition for Reconsideration of Memorandum Opinion & Order Released October 30, 1967", Filed on November 29, 1967 by Radio Station WAIT, Chicago, Illinois. In support whereof the following is shown:

1. "In its Memorandum Opinion & Order denying WAIT's request for nighttime authorization on the non-duplicated clear channel frequency of 820 kc, the Commission found, and WAIT does not now dispute that WAIT's nighttime proposal violates Section 73.24(b)(3) of the Commission's Rules as well as the provisions relating to nighttime operation on clear channels (Sections 73.21, 73.25 and 73.182) since WAIT's proposed nighttime operation would not provide primary service to any "white" area and would cause interference to more than 2 million persons residing within a 70,000 square mile area within the WBAP/WFAA 0.5 mv/m - 50% nighttime skywave contour.

242-10  
List B  
Bk  
12-26-67

AVAILABLE

bound volume

Additionally, the Commission found, and WAIT again does not dispute, that the proposed nighttime operation would fail to serve no less than 30.7% of the population and 80.5% of the area within WAIT's proposed normally protected contour. Moreover, as shown in the engineering statement submitted with the WBAP opposition to WAIT's proposal and as further demonstrated by

[282]

the engineering statement submitted herewith, the WAIT proposal would also cause interference to the vast secondary area, beyond the WBAP/WFAA 0.5 mv/m - 50% skywave contour, particularly in the northern and western parts of the United States.

2. In its Petition for Reconsideration, WAIT argues, in essence, that even though its nighttime proposal is in hopeless conflict with several basic Commission allocation rules and policies that proposal should nevertheless be granted since according to WAIT, there is a plethora of other aural services available in the area within the WBAP/WFAA 0.5 mv/m - 50% nighttime sky wave contour that would receive interference, and the public in that area "neither uses nor is served by, the skywave signal of WBAP/WFAA" (Petition, p. 2). Neither of these contentions is relevant as a matter of law, nor correct as a matter of fact.

3. In the first place, WAIT's arguments regarding the other services available in the interference area completely ignores the serious question presented by WAIT's failure to comply with Section 73.24(b)(3) of the Commission's Rules, which

requires that an applicant for nighttime facilities demonstrate that it will "provide a first primary AM service to at least 25% of the area within the proposed interference free nighttime service area." WAIT does not challenge the validity of this regulation--which is one of the touchstones of the Commission's allocation scheme (see, e.g., Maricopa County Broadcasters, Inc. 6 RR 2d 681); nor has it presented any grounds whatever for waiver of the rule. Therefore, its claim that the Commission is somehow engaged in unconstitutional over-regulation in applying the rule cannot be seriously considered.

[283]

4. Secondly, as the Commission made clear in its 1961 Clear Channel Broadcasting Report, one of the basic purposes in prohibiting additional nighttime authorizations on 820 kc was to permit WBAP/WFAA and certain other western clear channel stations to continue their nighttime skywave service to the "vast regions [of the west] of low population density where skywave signals afford the only nighttime broadcast service." <sup>1/</sup> These regions are all outside the WBAP/WFAA 0.5 mv/m - 50% nighttime skywave contour and, therefore, the other services available in the interference area within that contour are completely irrelevant.

5. The other services available in the interference area are also irrelevant since WAIT has not shown that the need for the nighttime service which it would provide outweighs the need for the service that would be lost--both within the 0.5

mv/m - 50% skywave contour and beyond. Cf., Democratic Printing Co. v. FCC 202 F. 2d 295 (C.A.D.C., 1952). Indeed, since there are no less than 25 radio stations in operation at night in Chicago and the immediate vicinity, it is inconceivable that such a showing could be made.

6. In any event, the fact of the matter is that there are not a "vast number" of radio services available in the interference area, as WAIT contends. Thus, as shown by the attached statement of Jules Cohen, a consulting electronics engineer whose qualifications are a matter of record with the Commission, WAIT's showing first does not distinguish between primary and secondary service and, as a further matter, the showing does not distinguish between the "normally protected" and "interference free" contours of the primary service--both

1/ Clear Channel Broadcasting in the Standard Broadcast Band, 31, FCC 565, 576, Aff'd. Sub Non. Goodwill Stations, Inc. v. FCC 325 F. 2d 637 (C.A.D.C., 1963).

[284]

AM and FM--upon which WAIT relies. There are, in fact, a maximum of six and, for the most part, three or less primary AM services available in the interference area, which are hardly a "vast number."

7. Lastly, WAIT's claim (Petition, p. 9) that WBAP does not treat the population within the interference area as part of the station's "listening public" is completely

erroneous, even if relevant.<sup>2/</sup> As shown by the attached affidavit of Mr. Roy Bacus, the WBAP General Manager, Station WBAP is acutely aware of the fact that WBAP/WFAA are the only stations operating at night on the frequency 820 kc and during the night hours when WBAP operates on that frequency, midnight to 6 a.m., the station structures its programming on the basis of a national audience, which includes the interference area, and beyond. Thus, during those hours Station WBAP's overall program format is specifically designed "to serve the needs and interests of late-night radio listeners throughout the country at large, including in particular, automobile and truck drivers driving at night. . . and farmers and other persons rising for work before dawn." To cite two specific examples, Station WBAP's news programming between midnight and 6 a.m. is devoted exclusively to national and international events and does not include reports of local events, and the station's weather reports during those hours similarly is devoted to national reports.

<sup>2/</sup> Factors such as the extent of the WBAP audience measured by ARB in the interference area (Petition, p. 7), Station WBAP's promotional efforts (Petition, pp. 8-9), and the station's rate structure (Petition, p. 10) are, obviously, completely irrelevant to the allocation questions presented by WAIT's nighttime proposal. Indeed, ~~these factors are~~ even irrelevant to WAIT's own formulation of the question presented, i.e., whether WBAP considers the population within the interference area to be part of its nighttime listening public. In any event, as shown by the attached affidavit of Station WBAP's General Manager, the station does in fact have a substantial listening audience in the interference area. Thus in a recent contest conducted by the station, more than 1,550 entries were received from outside the State of Texas, with the largest number, 156, coming from the State of Illinois.



[285]

WHEREFORE, the "Petition for Reconsideration of Memorandum Opinion & Order Released October 30, 1967", filed on November 29, 1967 by Radio Station WAIT, Chicago, Illinois, should be denied.

Respectfully submitted,

SCHARFELD, BECHHOFFER & BARON

By Theodore Baron  
Theodore Baron

Michael Finkelstein  
Michael Finkelstein

Attorneys for  
Carter Publications, Inc.

December 26, 1967

BEST COPY  
from the original

JULES COHEN & ASSOCIATES  
CONSULTING ELECTRONICS ENGINEERS  
WASHINGTON, D. C.

ORIGINAL

ENGINEERING STATEMENT  
IN BEHALF OF CARTER PUBLICATIONS, INC., SUPPORTING A REPLY  
TO A PETITION BY RADIO STATION WAIT FOR RECONSIDERATION OF  
MEMORANDUM OPINION AND ORDER RELEASED OCTOBER 30, 1967

Jules Cohen, being first duly sworn, says that he is a partner in the firm of Jules Cohen & Associates, consulting electronics engineers, that he is a professional engineer registered in the District of Columbia and Commonwealth of Virginia; and that his qualifications as an engineering expert are a matter of record with the Federal Communications Commission. The instant engineering statement was prepared in behalf of Carter Publications, Inc., licensee of radio station WBAP, Fort Worth, Texas, in support of a reply to a Petition by radio station WAIT for reconsideration of the Commission's Memorandum Opinion and Order released October 30, 1967, which returned as unacceptable an application by WAIT for unlimited operation on the frequency 820 kHz.

This engineering statement is concerned with the following matters treated explicitly or implicitly in the WAIT petition: (1) Extent of interference to WBAP/WFAA; (2) the availability of primary services within areas expected to receive interference from WAIT; (3) the availability of secondary services within the area expected to receive interference from WAIT; and (4) the availability of FM services within the area expected to receive interference from WAIT.

Extent of Interference to WBAP/WFAA

The WAIT pleading explicitly defines the zone of interference to WFAA/WBAP from the proposed nighttime operation

287

JULES COHEN & ASSOCIATES  
CONSULTING ELECTRONICS ENGINEERS  
WASHINGTON, D. C.

page 2

Engineering Statement  
Fort Worth, Texas

of WAIT as an irregularly shaped crescent within the 0.5 mv/m, 50% skywave contour of WFAA/WBAP. As a matter of fact, the interference zone would be substantially in excess of that shown.

The Rules of the Federal Communications Commission provide that on the frequency 820 kHz, and on similar Class I-A channels reserved for exclusive use of one station during nighttime hours, protection from cochannel interference is provided on the basis of the exclusivity of use. Stated otherwise, this means that at least as far as domestic operations are concerned, the nighttime operation is protected for cochannel interference everywhere within the country. The WAIT petition implies an understanding of that requirement by purporting to show secondary services available beyond the WFAA/WBAP 0.5 mv/m, 50% skywave contour, but no attempt has been made by WAIT, in either the application initially tendered or in this petition for reconsideration, to analyze the full extent of objectionable interference to the WFAA/WBAP secondary service area.

The special nature of secondary service must be comprehended in considerations of interference. Because of the variability of the secondary service, a statistical approach is employed. This must be differentiated from the primary service which is considered to be continuously available. For a channel such as 820 kHz on which the FCC has specified no "normally protected contour", a showing of interference only within the 0.5 mv/m, 50% skywave contour defines only part of the area affected.

In the absence of objectionable interference from cochannel or adjacent channel stations, the usability of a signal is determined principally by its ratio to atmospheric noise. Even when the atmospheric noise level would preclude

BEST COPY  
from the origin

JULES COHEN & ASSOCIATES  
CONSULTING ELECTRONICS ENGINEERS  
WASHINGTON, D. C.

Engineering Statement  
Fort Worth, Texas

page 3

service for signal strength of less than 0.5 mv/m, secondary service does not stop at the 0.5 mv/m, 50% skywave contour. Signal strength of that level is available at greater distances but at time percentages of less than 50%. The northern part of the United States, the area which would be most affected by WAIT nighttime operation, enjoys particularly low atmospheric noise levels permitting useful service from signal strengths less than 0.5 mv/m. Therefore, for a significant percentage of time, service is available from WFAA/WBAP well beyond the 0.5 mv/m, 50% skywave contour. WAIT has defined only a small portion of the total area which would lose the availability of WFAA/WBAP service.

Primary Services Showing

The WAIT petition purports to show the primary services available within the limited area which WAIT has defined as the zone of interference to WFAA/WBAP. Except for acknowledgment of the use of Figure M3 for ground conductivities, no statement is made as to what contours are actually being represented. Presumably, those contours are "normally protected", but the showing is without meaning unless it is established that the contours are indeed "interference free". Consideration should be given not only to the possibility of interference from other radio stations, both domestic and foreign, but also to the possibility of portions of these areas being in the "distortion zone" where a station's own skywave is of sufficient intensity to cause interference with groundwave reception because of the phase difference between the skywave and the groundwave at the listener's receiver.

Secondary Services Showing

The treatment of secondary services given in the WAIT petition fails to consider properly the nature of

200

JULES COHEN & ASSOCIATES  
CONSULTING ELECTRONIC ENGINEERS  
WASHINGTON, D. C.

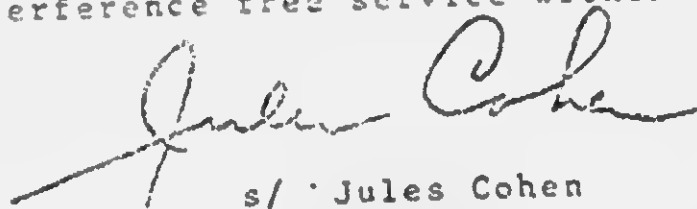
page 4

Engineering Site Report  
Fort Worth, Texas

secondary services. Because of the variability of the skywave service, a multiplicity of such services must be provided so that listeners in areas with few or no primary services may have a choice of programs. To say that half the time seven services are available is meaningful in a statistical sense, but the listener is not to be consoled by such statistics when, at a particular time, he can find only one or two useful signals. In order to assure the rural listener of service when he chooses to listen, a opportunity must be provided for a substantial number of stations to be freed from objectionable interference from other stations at all times.

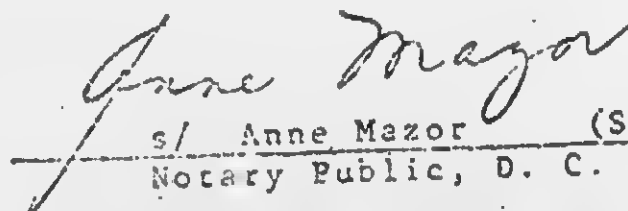
FM Services Showing

The WAIT petition adopts a National Association of Broadcasters Map prepared in March, 1966, showing predicted coverage to outermost 50 microvolt per meter contours to "demonstrate" that 99% of the area which WAIT defines as the area of interference to WFAA/WCAP has available FM service. In the absence of a showing that these FM services are interference free, the conclusion is ill founded. In fact, the area between the one millivolt per meter and the 50 microvolt per meter contours of an FM station are not likely to be interference free. In hearing proceedings, the Federal Communications Commission has specified that the one millivolt per meter contour be shown for FM stations because the allocation plan provides for the maintenance of interference free service within that contour.

  
s/ Jules Cohen

Subscribed and sworn to before me this 19th day of December, 1967.

My commission expires  
October 31, 1971

  
s/ Anne Mazor (SEAL)  
Notary Public, D. C.

BEST COPY  
from the original

THE STATE OF TEXAS ]

COUNTY OF TARRANT ]

ROY BACUS, being first duly sworn, submits this statement in support of the Opposition of Carter Publications Incorporated to the "Petition for Reconsideration of Memorandum Opinion and Order released October 30, 1967" filed on November 29, 1967, by Radio Station WAIT, Chicago, Illinois.

1. I am General Manager of Stations WBAP-Am-FM-TV and as such I am personally and thoroughly familiar with the programming operations of Radio Station WBAP.

2. I have read the "Petition for Reconsideration of Memorandum Opinion and Order released October 30, 1967" filed by Radio Station WAIT in which it is stated (§9) that Station WBAP does not consider the population in the area in which nighttime operation of Station WAIT would cause objectionable interference to be part of Station WBAP's listening public. That statement is false.

3. Pursuant to its share-time arrangement with Station WFAA, Dallas, Station WBAP operates on the frequency 820 k.c. from midnight to 6 a.m., daily. In selecting the programs to be broadcast during those hours, Station WBAP has been aware that its programs can be received well beyond Fort Worth and the immediate surrounding area and Station WBAP has always considered the national and international characteristics of its audience.



Accordingly, during those hours Station WBAP broadcasts programs designed to serve the needs and interests of late-night radio listeners throughout the country at large, including, in particular automobile and truck drivers driving at night (who in many instances rely upon clear channel stations for constant radio reception) and farmers and other persons rising for work before


291

dawn.

4. For example, Station WBAP does not include local news in newscasts broadcast between midnight and 6 a.m. and devotes its newscasts during those hours to reports on national and international events. Similarly, the Station WBAP weather reports during the hours between midnight and 6 a.m. emphasize national weather conditions. In connection with the WBAP weather reports, it is significant that during Hurricane Beulah the Station WBAP professional meteorologist provided a continuing analysis for the Station's national audience which resulted in calls to the Station from throughout the country.

5. Lastly, Station WBAP from time to time has conducted listener contests which, among other things, have provided the Station with some gauge of its audience outside the immediate Fort Worth area. One such contest, entitled the "Greatest

Distance from WBAP-820 Contest" was conducted from April 5 to 11, 1965, and resulted in the Station receiving more than 1,550 entries from outside the State of Texas. Significantly, the largest number of entries, 156, came from the State of Illinois.

  
 Roy Bacus

Subscribed and sworn to before me by the said ROY BACUS on this 22nd day of December, 1967.

  
 Notary Public, Tarrant County, Texas

My Commission expires June 1, 1969.

292

CERTIFICATE OF SERVICE

I, Rita Cook, a secretary in the Law Firm of Scharfeld, Bechhoefer & Baron, hereby certify that I have this 26th day of December, 1967, mailed, U. S. postage prepaid, a copy of the foregoing OPPOSITION OF CARTER PUBLICATIONS, INC. TO PETITION FOR RECONSIDERATION to the following:

Arthur Stambler, Esquire  
 Law Offices of Arthur Stambler  
 1737 DeSales Street, N.W.  
 Washington, D. C. 20036  
 Counsel for Radio Station WAIT

Fly, Shuebruk, Blume & Gaguine  
30 Rockefeller Plaza  
New York, New York 10020  
Counsel for Midwest Radio-TV

William J. Dempsey, Esquire  
Dempsey & Koplovitz  
938 Popen Building  
Washington, D. C. 20005  
Counsel for A. H. Belo Corp. (WFAA)

Russell Hagan, Esquire  
Kinkaid, Ellis, Hodson, Chaffetz & Masters  
916 - 16th Street, N.W.  
Washington, D. C. 20006  
Counsel for Clear Channel B/Cng. Service

*Rita Cook*

Rita Cook

203

RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

Dec 26 1957

OFFICE OF THE SECRETARY

In re Application of )

Maurice Rosenfield, Lois P. )  
Rosenfield, Howard A. Weiss, )  
Robert G. Weiss, and Ferce, )  
Shadur, Mikva, and Plotkin, )  
A Co-Partnership d/b as )  
WAIT RADIO )  
Chicago, Illinois )

File No.

For Construction Permit )

To the Commission )

OPPOSITION TO PETITION  
FOR RECONSIDERATION

BEST COPY  
from the original

Clear Channel Broadcasting Service (CCBS), by its attorneys, hereby submits its Opposition to the Petition for Reconsideration of the Memorandum Opinion and Order Released herein on October 30, 1967 filed by the above-captioned applicant (hereinafter WAIT) on November 29, 1967. In support thereof, the following is shown:

1. On March 7, 1967, Class II station WAIT filed an application for nighttime operation on 820 kc (a Class I-A Clear Channel) and in connection therein submitted along with a Request for Waiver of the numerous Commission rules which would be contravened by a grant of the requested authority and a Petition for Oral Presentation.

2. The WAIT application, waiver request and petition for an oral hearing were opposed by Carter Publications, Inc. (WBAP),

## 294

A.H. Belo Corporation (WFAA), Midwest Radio-Television, Inc. (WCCO), and CCBS. WAIT filed a Reply to the Oppositions on June 20, 1967. By a Memorandum Opinion and Order released October 20, 1967 (WAIT Radio, 11 RR 2d 603 (1967)), the Commission denied WAIT's Request for Waiver and Petition for Oral Hearing and returned the application as unacceptable. WAIT now petitions the Commission to reconsider this decision.

3. WAIT in its Petition for Reconsideration advances no new arguments, but merely repeats and embellishes those contained in its original pleadings. Essentially WAIT reargues that its Constitutional rights are infringed by the Commission's Rules granting Class I-A protection to

WFAA/WBAP. This argument has already been correctly rejected by the Commission. See WAIT Radio, 11 RR 2d at 606 & n.5.

4. The Commission has carefully considered the merits of the WAIT waiver request, the oppositions filed against it, and WAIT's reply, and has found that "since the applicant has not set forth reasons sufficient, if true, to justify waiver, there is no need for a hearing." Ibid. Although WAIT now alleges additional facts in an attempt to bolster the claims already made in its Request for Waiver and Reply to Oppositions, it advances no new reasons for a waiver. <sup>\*/</sup> Therefore, for the reasons set forth in the Commission's Memorandum Opinion and Order and in the oppositions to the original Request for Waiver (all of which are hereby

---

<sup>\*/</sup> Of course, these new facts need not even be considered by the Commission. See Rules §1.106(c)

200

incorporated into this Opposition), WAIT's Petition for Reconsideration must be denied.

Respectfully submitted,

CLEAR CHANNEL BROADCASTING SERVICE

[Subscription Omitted in Printing]

\* \* \* \*

[Certificate of Service Omitted in Printing]

296

297

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

Dec 26 1967  
OFFICE OF THE SECRETARY

In re Application of )

Maurice Rosenfield, Lois P. Rosenfield, )  
Howard A. Weiss, Robert G. Weiss, and )  
Devoe, Shadue, Mikva, and Plotkin, A )  
Co-Partnership d/b as )  
WAIT RADIO )  
Chicago, Illinois )

File No. (unassigned)

For Construction Permit )

To the Commission:

OPPOSITION TO PETITION FOR RECONSIDERATION

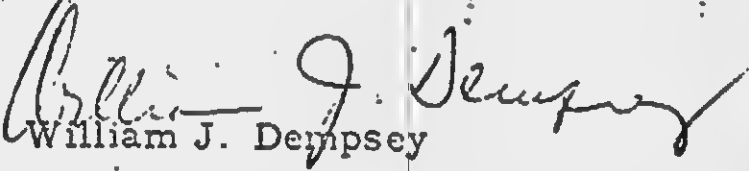
Comes now A. H. Belo Corporation, licensee of Station WFAA, 820 kc., Dallas, Texas, and opposes the WAIT RADIO Petition for Reconsideration of the Memorandum Opinion and Order of October 30, 1967, in the above-entitled matter on the ground that it is solely repetitious and raises no matters that have not been considered and disposed of by the Commission in that opinion and order.

Respectfully submitted,

A. H. BELO CORPORATION (WFAA)

By: Dempsey and Koplovitz  
Its Attorneys

938 Bowen Building  
Washington, D. C. 20005

By:   
William J. Dempsey

December 26, 1967



[Caption Omitted in Printing]

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1968 Released: January 31, 1968

By the Commission: Commissioner Lee absent.

1. The Commission has before it for consideration a Petition for Reconsideration filed by the above-captioned party (WAIT) on November 29, 1967, directed against the Commission's action of October 26, 1967, Memorandum Opinion and Order, 10 FCC 2d 481, 11 IRR 2d 603, released October 30, 1967, denying the petitioner's request for waiver and oral presentation on its application for extension of its hours of operation; also oppositions filed by Carter Publications, Inc., licensee of Station WBAP, Fort Worth, Texas; A. H. Belo Corporation, licensee of Station WFAA, Dallas, Texas, and Clear Channel Broadcasting Service, respectively.

2. As stated in the above-referenced Memorandum Opinion and Order, the Class I-A stations on channels reserved for the exclusive use of one station during nighttime hours (including 820kc) are protected from co-channel interference (Section 73.182(v)); also that the facilities requested by petitioner would not provide any primary service to "white areas", would cause interference to a large area and population within the WFAA/WBAP 0.5 mv/m-50% skywave contour, and would fail to serve 30.7 percent of the population and 80.5 percent of the area within its proposed normally protected contour, and that the proposed operation would thus be in violation of Sections 73.24, 73.24(b)(3), 73.25, and 73.182 of the Commission's Rules. We also found that WAIT had not attacked the Commission's Clear Channel policy or urged revision of these rules, and that it had not provided sufficient basis for waiving the rules governing the allocation of broadcast facilities or for a hearing in the matter.

3. The petition for reconsideration provides additional details and engineering data concerning indicated interference effects and projected broadcast service of the proposal, other radio services in the interference area, and information concerning the WBAP/WFAA programming and listening audience, all relating to petitioner's original arguments for waiver and acceptance of its application on which we have already ruled. As pointed out in the opposition comments, WAIT has advanced no new reasons for a waiver, nor any matters that have not been considered and disposed of in our former Memorandum Opinion and Order herein.

Accordingly, IT IS ORDERED, That the position of WAIT Radio IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple  
Secretary

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAURICE ROSENFELD, LOIS F. ROSENFELD,  
HOWARD A. WEISS, ROBERT G. WEISS and  
DEVOE, SHADUR, MIKVA & PLOTKIN, a  
co-partnership d/b/a WAIT RADIO,

Appellant

v.

No. 21,689

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee

CLEAR CHANNEL BROADCASTING SERVICES  
CARTER PUBLICATIONS, INC.  
A. H. BELLO CORPORATION,

Intervenors

PREHEARING STIPULATION

The undersigned, by their counsel, stipulate and agree as follows:

I. In the opinion of appellant, the following issues are presented in the above-entitled case:

1. Whether the Commission's refusal to permit appellant to file its application for a construction permit and denial of its request for waiver was, under the circumstances of this case, arbitrary, contrary to the public interest, convenience and necessity, and in violation of the Communications Act.

2. Whether the Commission's denial without hearing of appellant's application and request for waiver was violative of Section 309 (47 U.S.C. § 309) and other provisions of the Communications Act.

3. Whether the Commission's refusal to waive the "clear channel" rules, notwithstanding that their rationale was inapplicable, resulted in an "overbreadth" being extended to those rules in violation of the Communications Act and the First and Fifth Amendments to the United States Constitution.

4. Whether the Commission may lawfully, under the Act or the Constitution, apply its rules so as to deny additional radio service to a large population where the grant of such additional service will not result in the loss or

diminution of radio service to any other group of people.

5. Whether the Commission's rejection of appellant's application and denial of its request for waiver, thereby requiring appellant to continue to operate in the Chicago market at a competitive disadvantage to other stations which are permitted to operate on a full time basis, without any resulting benefit to any other part of the radio audience in the United States, was in violation of the Constitution.

II. The Commission and the intervenors do not agree with the issues as set forth by appellant, and they believe that the question presented is:

Whether the Commission's dismissal of WAIT's application and denial of its request for waiver of Sections 73.21, 73.24, 73.25 and 73.182 of the Commission's engineering regulations, without hearing, was arbitrary, contrary to the public interest, and in violation of the Communications Act and the Constitution of the United States.

III. The counsel for the parties further stipulate and agree that the Joint Appendix will be filed ten (10) days after filing of the reply brief and, if no reply brief is filed, fifteen (15) days after the filing of Appellee's brief. References to the record appearing in the briefs of the parties will be to the page numbers of the record as certified to the Court. In the printing of the Joint Appendix there will be set forth, in addition to the consecutive numbering of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the brief.

Respectfully submitted,  
/s/ Robert M. Lichtman  
Counsel for Appellant

/s/ John H. Conlin  
Counsel for Appellee

/s/ R. Russell Eagan  
Counsel for Intervenor Clear  
Channel Broadcasting Service

**BEST COPY**  
from the origin

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 21,689

WAIT RADIO, a Co-partnership,  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee

CARTER PUBLICATIONS, INC.,  
CLEAR CHANNEL BROADCASTING SERVICE,  
A. H. BELO CORPORATION,  
MIDWEST RADIO-TELEVISION, INC.,  
Intervenors

---

Appeal from the Federal Communications Commission

---

Decided June 24, 1969

Before DANAHER,\* LEVENTHAL and ROBINSON, *Circuit Judges*.

LEVENTHAL, *Circuit Judge*: WAIT Radio brings this appeal to protest a decision by the Federal Communications Commission rejecting as unacceptable its application for authority to operate its station on an unlimited time basis.<sup>1</sup> We think the Commission erred by not giving adequate reasons for denying and refusing to hold a hearing on appellant's request for waiver of certain FCC rules and we remand for further consideration.

---

\* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

<sup>1</sup> WAIT Radio brings this appeal pursuant to 47 U.S.C. § 402 (1964).

## I

WAIT operates a Chicago AM radio station on a frequency of 820 kHz, one of the so-called clear channels. Under FCC "clear channel" rules certain AM frequencies are designated as clear channels that can be used at night only by specified stations that broadcast a signal to "white areas," sparsely populated regions that have no local radio service.<sup>2</sup> Because of the "skywave contour" characteristics of nighttime radio signals, other stations broadcasting on a "clear channel" frequency must close down at night to avoid interference in "white" area reception with those stations particularly authorized to transmit this special nighttime signal. As a result, WAIT operates on a sunrise to sunset basis.

WAIT filed an application requesting a waiver of the clear channel rules. Its proposal included plans for constructing a directionalized antenna that would beam its signal away from "white" areas that were being served by stations WBAP and WFAA, licensed to operate clear channels on KHZ out of Fort Worth/Dallas, Texas. WAIT's application asserted that by confining its signal, its skywave beam would not interfere with the serviceable contour of the signal from the Texas stations except in regions that receive primary groundwave service from at least one other station,<sup>3</sup>

<sup>2</sup>The pertinent rules are found in 47 C.F.R. §§ 73.21, 73.25, 73.182(a)(1)(i), and 73.182(w) (1968). While § 73.24, 47 C.F.R. § 73.24 (1968), is also involved, it would seem that in the context of this application for waiver, it adds nothing, a point to which we will return.

During the nighttime hours the normal radio signal will travel in what the trade calls a "skywave contour." The effective broadcast radius of the signal projects into remote regions that cannot pick up the signal during daylight hours. The clear channel policy attempts to capitalize on this engineering phenomenon by utilizing the skywave contour of strategically located stations to service remote and sparsely populated regions of the country, so-called "white areas," where no local stations exist to serve the area with the so-called "primary" radio signal that we are accustomed to tuning in on our receivers. Under Commission rules the clear channel frequencies are to be free from interference of signals from other stations.

<sup>3</sup>WAIT appended to its application detailed engineering data and a map explaining and demonstrating the range of its proposed directionalized signal. Compare *Rio Grande Radio Fellowship Inc. v. FCC*, \_\_\_ U.S.App.D.C. \_\_\_, 406 F.2d 664 (1968). The application assumed, based on "engineering convention" that any interference beyond the "0.5 mv/m 50%" intensity of the Texas signal was not contrary to clear channel policy. In brief appellant has explained the "0.5 mv/m 50%" designation as being the outer serviceable range of a skywave broadcast signal. Under normal conditions it seems that beyond that range a listener will miss about 50% of the broadcast. The Commission's opinion and order does not dispute WAIT's asser-



and its ostensible violation of Commission rules would not conflict with the policy underlying the "clear channel" rules.

In support of its waiver request WAIT further alleged that its programming of "good" music and forum discussions on matters of public interest is a unique AM service in the Chicago area. Appended to the application were supporting data, of surveys, etc., indicating listener preference for such programming. The application further alleged that the present fluctuating broadcast schedule, dependent on the actual time of sunrise and sunset, and no evening service, is a disadvantage. WAIT makes particular reference to its distinctive adult audience, able during the evening hours to listen to, and understand, serious social, political and educational programs, and it claims that the limitation on its channel is a limitation on communication of ideas.<sup>4</sup>

The Commission rejected WAIT's request in an opinion and order of October 25, 1967, and ordered that the appli-

tion that the "0.5 mv/m 50%" range delineates the serviceable nighttime signal. Should plans to increase the power on these stations go into effect, it does appear, as noted by intervenors, that WAIT's new service might cause interference in some areas within a "0.5 mv/m 50%" contour. The Commission's opinion, however, does not in any way rely on this fact in rejecting WAIT's application, and the application itself, envisioning such a development, seeks the new authorization subject to a change in Commission policy on broadcast power of existing clear channel stations.

A variant contention put forth by the intervening Texas stations was that interference with their signal, even beyond the "0.5 mv/m 50%" contour, runs afoul of the clear channel policy. The Commission did not rule on this contention. In its Petition for Reconsideration WAIT points out that the programming of the Texas stations does not constitute meaningful service to the non-white area market within the "0.5 mv/m 50%" contour of the Texas stations. This, according to WAIT, is also true of areas beyond the protected contour where the primary service is not only superior to the weak and intermittent reception from the Texas station, but also carries programs of greater interest and relevance to the audiences which are quite remote from the Texas area. Detailed lists were attached to the Petition identifying the cities and areas where WAIT's signal might interfere with that of the Texas stations and also identifying the available alternative services.

<sup>4</sup>The issue may be said to be whether the public interest requires limitation of the freedom of the listening public at home. Compare *Stanley v. Georgia*, \_\_\_ U.S. \_\_\_ (1969).

cation be returned as unacceptable. WAIT appeals from this decision and order and the Commission's subsequent denial of its petition for reconsideration.

## II

Able arguments have been presented on both sides. Appellant stresses to us, as it did in memoranda to the Commission, that First Amendment considerations permeate the field of public broadcasting. First Amendment principles, WAIT says, mean that the Commission's conceded power to license and regulate in the "public interest" must be exercised with circumspection, that the rules must be drawn as narrowly as possible so as to give the widest possible play to freedom of expression. It is contended that the Commission's failure to waive its clear channel rules, where this underlying policy will not be infringed, is contrary to the First Amendment's policy of freedom of expression.

The Commission in effect replies to the First Amendment issue by invoking *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), and other decisions affirming the power to regulate the use of broadcast facilities.

At this juncture, we do not rule on appellant's contentions, which go to the impact of the First Amendment on the substantive content of broadcast regulations. When an application pleads, and offers factual material in support of, a non-frivolous First Amendment contention, an agency may not dismiss it with the routine treatment that might suffice in the ordinary case. We hold that the Commission must state its basis for decision with greater care and clarity than was manifested in its disposition of WAIT's claims, and remand for a clearer statement of reasons.

I. Two strands of doctrine apply to the judicial review of administrative determinations. First is the principle that an agency or commission must articulate with clarity and precision its findings and the reasons for its decisions. The importance of this requirement is inherent in the doctrine of judicial review which places only limited discretion in the

reviewing court. As Justice Harlan recently said in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968):

The court's responsibility is not to supplant [a] Commission's balance of . . . competing interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function most accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the regulated industry.<sup>5</sup>

Of course busy agency staffs are not expected to dot "i's" and cross "t's." Our decisions recognize the presumption of regularity.<sup>6</sup> We adhere to "salutary principles of judicial restraint."<sup>7</sup> Courts are indulgent toward administrative action to the extent of affirming an order where the agency's path can be "discerned" even if the opinion "leaves much to be desired."<sup>8</sup>

<sup>5</sup>See also *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194 ( ); *Radio Station KFH Co. v. FCC*, 101 U.S.App.D.C. 164, 247 F.2d 570 (1957); *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579, 586-89 (1st Cir. 1964); Jaffe, *Judicial Control of Administrative Action* (1965).

<sup>6</sup>See *Braniff Airways, Inc. v. CAB*, 126 U.S.App.D.C. 399, 406, 379 F.2d 453, 460 (1967), where we said "A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues."

<sup>7</sup>See *id.* at 409, 379 F.2d at 463, alluding to "salutary principles of judicial restraint."

<sup>8</sup>See *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945); *Pikes Peak Broadcasting Co. v. FCC*, D.C. Cir. No. 22023, March 24, 1969, Slip Op. at 18, where we concluded we were "satisfied that the Commission gave . . . a hard look."

2. The tension between these principles is heightened when a court undertakes to review administrative action on an application for waiver. Presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule. An applicant for waiver faces a high hurdle even at the starting gate. "When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action." *Rio Grande Family Radio Fellowship, Inc. v. FCC*, *supra* note 3. Yet an application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. *Permian Basin Area Rate Cases*, *supra*; *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. at 204-05 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *American Airlines v. CAB*, 123 U.S.App.D.C. 310, 359 F.2d 624 (en banc), *cert. denied*, 385 U.S. 843 (1966); *Pikes Peak Broadcasting v. FCC*, *supra* note 8; *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968).

The salutary presumptions do not obviate the need for serious consideration of meritorious applications for waiver; and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the "public interest." That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. A general rule implies that a commission need not re-study the entire problem *de novo* and reconsider policy every time it receives an application for waiver of the rule. On the other hand, a general rule, deemed valid

rule. On the other hand, a general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest. An agency need not sift pleadings and documents to identify such applications, but allegations such as those made by petitioners, stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a "hard look."<sup>9</sup>

3. These principles are not easily reduced to a quantifiable formula for deciding when an agency disposing of a waiver application has crossed the line from the tolerably terse to the intolerably mute. There are strong indications that the boundary has been transgressed in the case before us. The Commission's order suggested, and perhaps even required, that WAIT's waiver application may not be entertained because it failed to proceed broadside against the clear channel policy.<sup>10</sup> The Commission's view that WAIT's request for waiver must fall in the absence of an attack on the general rule is underscored by its disposition of appellant's petition for reconsideration.<sup>11</sup> This approach is without merit. The very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted. And as already noted, provision for waiver may have a pivotal importance

<sup>9</sup>See *Pikes Peak Broadcasting v. FCC*, *supra* note 8.

The agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to hollow claims. The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary. Even when an application complies with these rigorous requirements, the agency is not required to author an essay for the disposition of each application. It suffices, in the usual case, that we can discern the "why and wherefore." See *Rio Grande Radio Family Fellowship, Inc. v. FCC*, *supra* note 3.

<sup>10</sup>See ¶ 6 of the Commission's opinion, set forth at note 12, *infra*.

<sup>11</sup>The Commission made a point of noting in its denial of reconsideration that "WAIT had not attacked the Commission's Clear Channel policy or urged revision of these rules. . . ."

in sustaining the system of administration by general rule.

The somewhat perfunctory treatment in the Commission's opinion is capped by the startling statement in paragraph 6 that the application is subject to dismissal out of hand because it revealed that in the absence of waiver there would be a violation of the Commission's rules.<sup>12</sup>

It may be that points raised on appeal by Commission counsel would support its order if they had been set forth by the agency, but argument by counsel cannot take the place of an agency's statement of reasons or findings.<sup>13</sup> Those points noted by counsel which do appear in the opinion are set forth merely as contentions of opponents

<sup>12</sup>The Commission said (¶ 6):

On the basis of appellant's statement that it does not attack the Clear Channel doctrine or policy of the Commission or urge reconsideration or revision of the Clear Channel rules, it is difficult to perceive a possible legal basis for the requested action in view of the clear and acknowledged violations of Sections 73.21, 73.25 and 73.182 of the Rules, which establish the so-called Clear Channels and the technical specifications for their use.

It is manifest error to deny a waiver on the ground that there would be a violation in the absence of the waiver sought.

The error is not retrieved by ¶ 7. Its bare statement that the application does not present a sufficient basis for waiver is a conclusion, not a reason. And paragraph 7 also reflects the view that overbreadth does not provide a possible legal basis for granting a waiver.

Compare *West-Michigan Telecasters, Inc. v. FCC*, \_\_\_ U.S.App. D.C. \_\_\_, 396 F.2d 688 (1968).

<sup>13</sup>See *NLRB v. Metropolitan Life Ins. Co.*, *supra* note 5; *Burlington Truck Lines, Inc. v. United States*, *supra* note 5; *West-Michigan Telecasters, Inc. v. FCC*, *supra* note 12; *Braniff Airways, Inc. v. CAB*, *supra* note 6. Counsel argued that allocation of 820 kHz to WAIT would be an inefficient use of the wave lengths. A directionalized transmitter would fail to serve 30% of the population and 80% of the area within WAIT's normally protected contour. Counsel also noted that stations in other areas might provide an additional primary service in a non-white area and also further Clear Channel policies if 820 kHz were in fact to be duplicated. It was further argued that the secondary service to areas receiving primary service on one or two frequencies is relevant to the decision of whether waiver should be granted.



not as reasons of the Commission.<sup>14</sup> Nor are the difficulties obviated by the opinion denying reconsideration, which purports to be only a restatement of the original opinion. That opinion reiterates that the circumstances showed an operation in violation of rules, a point we take as a tautology inevitable in an application for waiver, but which the Commission mistakenly takes as a reason for denial.

This is not the kind of case in which the court may be asked to "cut and sew the meagre materials at hand into the pattern which we guess the Commission had in mind."<sup>15</sup> A willingness to undertake minor alterations on an opinion already made is not an undertaking to custom tailor a new one.

4. The court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers. On the contrary a rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis. The limited

<sup>14</sup>The opinion also notes the proposals pending before the Commission to authorize high-power transmitters which would increase the effective radius of the sky-wave signal. Such increase in signal strength would result in interference over "white" areas by WAIT's signal. The Commission also stated without elaboration the contention by intervenors, and urged by counsel on appeal, that the additional skywave service in areas with limited primary service is relevant to the decision to grant a waiver. See note 3, *supra*. Compare *Permian Area Basin Rate Cases*, *supra*, 390 U.S. at 804.

We need not here decide whether the FCC could decline WAIT's request on the ground that a temporary waiver would be an unacceptable administrative burden, or would generate a sense of vested interest or related pressures interfering with future flexibility in the administrative process.

<sup>15</sup>See the concurring remarks of Mr. Justice Douglas in *ICC v. Columbus & Greenville Ry.*, 319 U.S. 551, at 559 (1943).



safety valve permits a more rigorous adherence to an effective regulation.<sup>16</sup>

Sound administrative procedure contemplates waivers, or exceptions, granted only pursuant to a relevant standard—expressed at least in decisions accompanied by published opinions, especially during a period when an approach is in formation, but best expressed in a rule that obviates discriminatory approaches.<sup>17</sup> The agency may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function. The process viewed as a whole leads to a general rule, and limited waivers or exceptions granted pursuant to an appropriate general standard. This combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility.

5. We have identified deficiencies in the FCC's opinion rejecting the application for waiver. We have examined the significance of the waiver procedure and pointed out that it is not necessarily a step-child, but may be an important member of the family of administrative procedures, one that helps the family stay together. These suffice for the case at hand, and we have no occasion to consider to what extent the overbreadth principle of First Amendment cases narrows the range of administrative discretion consistent with the general standard of "public interest" and places a special burden on the Federal Communications Commission not to maintain its general rules in an instance or class of instances not strictly furthering the policy of the regulation.<sup>18</sup> That the Commission's statutory assignment pertains

<sup>16</sup>See Leventhal, *Reviewing the Permian Basin Area Gas Price Hearings*, *Public Utilities Fortnightly* (March 12, 1964). Compare *Permian Area Basin Rate Cases*, *supra*, 390 U.S. at 822.

<sup>17</sup>*City of Chicago v. FPC*, 128 U.S.App.D.C. 107, 385 F.2d 629 (1968); *cert. denied*, 390 U.S. 945 (1968).

<sup>18</sup>Compare, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960). *Schneider v. Town of Irvington*, 308 U.S. 147 (1939).

to an industry concerned with basic freedoms of expression does not subject it to unmanageable standards, either as to substantive powers or procedures. But the manifest importance of subject-matter means that the Commission is not lightly to be indulged with dispensations from legal requirements.<sup>19</sup>

We think the pleading filed by WAIT, supported by data sufficient to overcome the initial hurdle, was entitled to reflective consideration. On balance we conclude the Commission's treatment, with its "combination of danger signals,"<sup>20</sup> belies the "hard look" the application merited.<sup>21</sup> We do not rule on substantive contentions, but remand for further consideration.

*So ordered.*

DANAHER, *Circuit Judge*, dissenting: When reduced to its bare bones, this appeal presents only a claim that these appellants are entitled as a matter of law to an additional

<sup>19</sup>See *Joseph v. FCC*, \_\_\_ U.S.App.D.C. \_\_\_, 404 F.2d 207, 212 (1968); compare *Northern Nat. Gas Co. v. FPC*, \_\_\_ U.S.App.D.C. \_\_\_, 399 F.2d 953 (1968); see also *Berko v. SEC*, 297 F.2d 116, 118 (2d Cir. 1961).

<sup>20</sup>See *Joseph v. FCC*, *supra*, \_\_\_ U.S.App.D.C. at \_\_\_, 404 F.2d at 212.

<sup>21</sup>Compare *Pike's Peak Broadcasting Co. v. FCC*, *supra* note 8, where we noted that a commission's order would be sustained where the agency took "a hard look" at petitioner's contentions even though "the standard [applied] would perhaps have become sharper had the Commission focused upon clearer rebuttal of petitioner's central allegations." Slip Op. at 17.

The Commission's conclusory reasoning and mechanical reliance upon *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), do not resolve appellant's contentions. WAIT, by seeking waiver, challenged neither the Commission's power to regulate, nor the validity of the general application of the clear channel rules. The issue is whether the Commission may curtail access to broadcast facilities by those applicants who, although technically in violation of a Commission rule, will not be undermining the purpose or policy which the rule was designed to further.

primary nighttime radio service to reach some 7 million people in the Chicago area. They even ask this court to direct that their "application be accepted for filing and that upon acceptance the application be granted." In those very words, their brief so concludes.

Never mind the Commission's Clear Channel doctrine or its policy; forget that the proposal patently violates the spirit and the letter of the provisions primarily of section 73.24(b)(3), and of other Rules in lesser degree; appellants want a larger audience; they wish to provide the Chicago area with a type of programming which they blandly say the listening audience should have. If their application be not granted, First Amendment rights will be flouted, they argue. Such is the posture of the case as submitted to the Commission and now to this court.

My colleagues remand, calling upon the Commission to articulate its reasons for refusing to grant a waiver of its long-standing Rules. It seems to me fundamental that the burden of making an adequate showing as to any such claimed entitlement rested upon the appellants. On the face of their application when read with their engineering exhibit against the Commission's standards, they wholly failed to sustain that burden, and the Commission so perceived.

Their application before the Commission disclosed that they would subject to interference an area of some 70,700 square miles and a population of some 2,165,502. Mr. Maurice Rosenfield, Managing Partner and Executive Director, represented that the appellants, including their counsel, not only were aware of legislative and administrative action but that through staff conferences and written directions and memoranda, the Station's employees and agents are kept informed of requirements. Thus the partners knew when they acquired the station in 1962 that they were permitted to operate, *daytime only*, on 820 kc. They were aware, of course, that they were to be "silenced" at night, although they now complain that they are being "silenced" by the Commission's action

here challenged. They knew all along that the channel was one of the Class 1 unduplicated clear channels, reserved for the exclusive use of one station during nighttime hours, and entitled to protection from co-channel interference. Even so, in the instant proceeding, the appellants did not attack the clear channel policy. They did not seek revision of the Commission's Rules. They simply said that despite the Rules, they are entitled to a nighttime audience in the city of Chicago, notwithstanding that their own application showed that the area "is served by more than twenty-five AM stations and sixteen FM stations."

Since their application said that they keep abreast of pertinent legislative and administrative actions, the appellants knew that the Commission's 1961 Report and Order in its Docket 6741 provided that 820 kc is one of 12 clear channels, not to be duplicated at night, and already reserved for expansion of "white area" service. In like manner, the appellants must have been aware of the Commission's 1962 Memorandum and Order which provided that the same clear channel, on 820 kc, was to be retained, subject to exploitation through the possible use of higher power.

Above all—indeed, without more—the application was defective as the appellants conceded, and accordingly the Commission noted, "that the proposal would cause interference as defined by section 73.24(b)(3)."<sup>1</sup>

Obviously, the Commission could see right on the face of the application with its attached engineering exhibit that

<sup>1</sup>That section provides in pertinent part that authorization for increase in the facilities of an existing station will be issued only after a satisfactory showing has been made

"That a proposed new nighttime operation . . . would (i) not cause objectionable interference to any existing station . . . and (ii) provide a first primary AM service to at least 25 per cent of the area within the proposed interference free nighttime service area."

Oddly enough, their opening brief here made no mention whatever of this threshold rule, and in their reply brief they rested solely on their "constitutional argument."

WAIT could not meet the established requirements. The Commission itself from its records and from its own engineering certainly knew what the appellants knew. Not only can it be seen from the text of the Commission's original Memorandum Opinion and Order that consideration had been given to the showing submitted by the appellants, but notice was taken of its lack of showing. The appellants' pleadings and exhibits had received a "hard look," I suggest. The appellants simply could not comply with the requirements, and the Commission in footnote 1 of its Memorandum Opinion and Order made specific reference to the appellants' engineering exhibit, there pointing out:

[T]he proposal would cause prohibited interference to an area approximately 850 miles long and 150 miles deep at its center, or what the appellant describes as "a territorial crescent 100% served via groundwave from local stations." Also, the proposal would not satisfy the "25% white area" requirements of this section.

So it was that the Commission concluded based upon its knowledge of the problem, its expertise in the field, the pleadings submitted, and as noted in paragraphs 6 and 7 of its Memorandum Opinion and Order, that the appellants had failed to present facts which would justify their request for waiver. So it was that the appellants' application was returned "as unacceptable for filing."

The Commission's action finds support in our cases,<sup>2</sup> and in the rulings<sup>3</sup> of the Supreme Court.

I would accept the record just as did the Commission and make my assessment particularly in light of the Commission's

<sup>2</sup>Carter Mountain Transmission Corporation v. FCC, 116 U.S.App. D.C. 93, 98, 321 F.2d 359, 364, *cert. denied*, 375 U.S. 951 (1963); Interstate Broadcasting Co. v. FCC, 105 U.S.App.D.C. 224, 228, 231, 265 F.2d 598, 602, 605 (1959). Cf. Transcontinent Television Corporation v. FCC, 113 U.S.App.D.C. 384, 389, 308 F.2d 339, 344 (1962).

<sup>3</sup>Nat. Broadcasting Co. v. United States, 319 U.S. 190 (1943).

expertise,<sup>4</sup> here called for in singular degree. Finding that the appellants had wholly failed to justify their requested waiver, I would suppose there was no alternative to a return of the application. As for the First Amendment contention, I would certainly agree that the right of free speech does not include the right to use the facilities of radio without a license and, assuredly, unless a construction permit were to be authorized in accordance with Commission rules, there could be no license. I see here no denial of free speech.

I will let Mr. Justice Frankfurter speak<sup>5</sup> for me, thus:

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.<sup>6</sup>

I oppose the remand. I would affirm the Commission.

<sup>4</sup>See cases cited in notes 2 and 3 *supra*. Especially take note of the Commission's policy and the findings exemplified in the 1961 and 1962 orders relating to the clear channel program, text *supra*, which would here be reduced to sheer vacuity.

<sup>5</sup>Nat. Broadcasting Co. v. United States, *supra* note 3, 319 U.S. at 226.

<sup>6</sup>Cf. Red Lion Broadcasting Co. v. FCC, \_\_\_ U.S. \_\_\_ (slip op. 22, 26 *et seq.*, June 9, 1969).

Before The

## FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20025

IN THE MATTER

OF

RADIO STATION WAIT

Docket No.

REQUEST FOR SPECIFICATION OF ISSUES AND PETITION  
FOR ORAL PRESENTATION

On June 24, 1969, the United States Court of Appeals for the District of Columbia remanded to the Commission for further consideration the request of WAIT Radio, filed March 7, 1967, for a waiver of the clear channel rules to enable it to broadcast at night on 820 kc. The Court of Appeals concluded that the Commission had failed to give the waiver request the "hard look" to which it was entitled.

The Court of Appeals decision necessarily contemplates a fresh examination by the Commission of the merits of the waiver request, with some possibility that the



Commission will this time reach a different conclusion. If this examination is to be a meaningful one, and not a mere academic exercise artificially performed upon the corpus of a record many months old, the applicant should be allowed to place before the Commission arguments and, if desirable, additional evidence focused upon the issues to be considered by the Commission.

The petitioner, however, encounters the same difficulty noted by the Court of Appeals in seeking to discover the path followed by the Commission in the earlier proceedings. In order to focus upon the appropriate questions, therefore, WAIT Radio hereby requests, pursuant to Section 1.41 of the FCC Rules and Regulations, that the Commission specify the issues it considers relevant to its reconsideration of the waiver request.

The further consideration directed by the Court of Appeals can, we believe, only be carried out if this request is granted and WAIT Radio is thereby allowed to provide focused support for its waiver request and, at the same time, assist the Commission in according its request the required "hard look." In addition, WAIT

Radio believes that a grant of the request for a specification of issues is mandated by the nature of a waiver request and the proceedings to date in this particular case.

WAIT Radio has already submitted extensive engineering and other data establishing that the directional antenna to be utilized for nighttime broadcasting would prevent interference with station WBAP-WFFA in Fort Worth/Dallas within any "white area" lacking nighttime primary service. The 25 per cent "white area" service rule was not intended to apply to a clear channel such as 820 kc. See AM Station Assignment Standards, 25 Pike & Fisher R.R. 1615, 1631 n. 37 (1963); cf. AM Station Assignment Standards, 2 Pike & Fisher R.R. 2d 1659, 1671 n. 12 (1964). Indeed, the policy supporting rule 73.24(b)(3) could not justify its application to clear channels, since the very designation of these frequencies as clear channels means that there is no problem of multiple operation and consequent congestion of them.

Since WAIT Radio challenges no general policy of the Commission, but rather claims only that its unique situation will allow it to broadcast at night without threatening any policy protected by the Commission's

rules, we have not attacked the rules but instead have requested their waiver. As the Court of Appeals recognized, waivers must be available as "safety valves" within any system of general rules precisely because

a general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.

WAIT Radio v. FCC, No. 21,689, Slip Op. at p. 8.

The burden upon one requesting a waiver is only to show that "a new service . . . will not undermine the policy served by the rule." Having made this prima facie showing of entitlement to a waiver, the applicant can do no more. He has spoken to all the issues raised by the rule; the Commission, in fairness, must produce more reasons for the rule or grant a waiver.

The Court of Appeals viewed the waiver process in precisely this fashion. Since it found that WAIT Radio had "overcome the initial hurdle" of showing that its nighttime operation would not threaten any policy advanced to support the clear channel rules, it examined the Commission opinion for an explanation why a waiver was denied. Finding none, the Court remanded for further consideration.

The Commission's brief to the Court of Appeals and statements by the Commission's staff have alluded to varying possible grounds for denying a waiver. At times, these have included (1) the possibility that super power may be authorized for clear channel stations, extending their nighttime signals; (2) the supposed danger of interference with the stations broadcasting on channels adjacent to 820 kc; (3) the possibility that the clear channel policy might be broadened to promote skywave service to "gray areas" receiving primary service from only one or two stations; (4) the desirability of allowing some unidentified station other than WAIT Radio to broadcast at night if additional operations on 820 kc are to be authorized; and (5) the possible substitution of a new contour line beyond the 0.5 mv/m 50% arc to mark the supposed limit of WBAP-WTAA's serviceable nighttime signal.

WAIT Radio has already submitted evidence which we believe bars reliance on any of these grounds for denial of a waiver. It might be desirable to introduce additional evidence, however, if the Commission now considers any of them relevant. At a conference requested by WAIT Radio, the Commission staff indicated that it now

considered issues (2), (3) and (4) most important. The petitioner now has additional evidence, which it plans to submit very shortly, of critical importance to the question of "gray areas." But we do not believe it would be constructive for us to barrage the Commission with additional evidence on all the remaining issues without some authoritative indication by the Commission of which issues it considers determinative.

The airwaves that the petitioner wishes to utilize for nighttime broadcasting are a precious and limited national resource, the management of which Congress has entrusted to the Commission. Since the right to communicate is at stake, the First Amendment commands that the Commission in carrying out its stewardship must insure the fullest possible use of available airwaves consistent with quality broadcasting. For the Commission to deny the petitioner's request to broadcast at night, after a showing that its voice would not interfere with any others, would be inconsistent with this command.

Therefore, WAIT Radio requests the Commission to specify which issues or issues it considers relevant in

its further consideration of this case. We believe that such a specification of issues at this time would better promote the goals of speed and finality than alternative of awaiting a new decision by the Commission and petitioning for reconsideration in the event of another denial of our request for a waiver of the clear channel rules.

If the Commission denies this motion, WAIT Radio requests that its petition for a waiver of the clear channel rules be set for oral presentation before the full Commission. We believe that a specification of issues by the Commission would be the most effective step at this time. By focusing the case at this stage upon the real questions involved, it would allow WAIT Radio to make an informed decision how it could best assist the Commission and support its application, whether by the submission of additional evidence or a supplementary brief, a request at that time for an oral presentation, or both. If the Commission does not agree with our analysis, however, we believe that WAIT Radio should at least be

allowed to appear before the full Commission in the hope  
that the issues could be aired and accorded a "hard look"  
at such a presentation.

Respectfully submitted,

RADIO STATION WAIT, a copartnership,  
Applicant

By Paul Weiss, Goldberg, Rifkind,  
WHARTON & GARRISON  
1725 K Street, N. W.  
Washington, D. C. 20006  
293-6370

HARRY KALVEN, Jr.  
University of Chicago Law School  
Chicago, Illinois 60637  
Midway 3-0800

Attorneys for Applicant



ENGINEERING STATEMENT FOR  
RADIO STATION W A I T  
CHICAGO, ILLINOIS  
OCTOBER, 1969

*Walter F. Kean*

Walter F. Kean, P.E.

*October 23, 1969*

BEST COPY

from the original

ENGINEERING STATEMENT FOR  
RADIO STATION W A I T  
CHICAGO, ILLINOIS  
OCTOBER, 1969

This engineering statement has been prepared for W A I T Radio, licensee of radio station W A I T, Chicago Illinois. At present, W A I T operates on 820 kc., 5.0 kilowatts power, employing a non-directional antenna, limited time.

On March 6, 1967 WAIT tendered for filing an application for authority to operate additionally with ten kilowatts power, directional antenna, on 820 kc., at a separate site during nighttime hours. WAIT later submitted a PETITION FOR RECONSIDERATION. These contain engineering statements prepared and signed by this writer dated January 10, 1967 and November 24, 1967, both of which show and discuss a "WAIT to WFAA/WBAP INTERFERENCE AREA" referred to for convenience as the crescent.

The principal purpose of those inquiries was to determine whether there would be any interference from such a proposed WAIT nighttime service to any white area located within the 0.5 mv/m 50% time skywave contour of WFAA/WBAP. The engineering statements demonstrate that no such interference to any white area would occur - that is, there was no white area within the .crescent

It is the purpose of this statement to demonstrate that by criteria within the Commission's Rules and Policies there is no gray area within the crescent.

By common usage within the broadcast industry and FCC proceedings gray area is that which receives only one primary broadcast service. This is shown on the map widely distributed by the Clear Channel Broadcasting Service (CCBS), a copy of which is included in the Appendix attached hereto.

For the gray area analysis of this engineering statement, the following principles were used:

1. AM and FM broadcasting have been treated as a single aural service in keeping with current proposals of the FCC (FCC Order No. 69-960, dated September 4, 1969, Docket No. 18651).
2. An area which has one AM groundwave service, but also has adequate FM service is therefore not a gray area.
3. All urbanized areas and communities with populations in excess of 2500 persons have been eliminated from consideration. This has been done because Section 73.182(g) of the Rules requires 2.0 mv/m groundwave to overcome man-made noise in population entities of that size, and nowhere within the crescent does the WFAA/WBAP skywave signal approach that magnitude. Therefore no urban area within the crescent is served by WFAA/WBAP.
4. For the purpose of determining whether an area is served by an AM groundwave, the signals necessary to render primary service to rural areas specified in Section 73.182(f) were used. With the minor exception stated below, a minimum signal strength of 0.25 mv/m groundwave was used to determine primary

service by Class I stations. Similarly, for the purpose of determining whether an area is adequately served by FM, only those signals of 1.0 mv/m or better were considered. An FM signal of 1.0 mv/m is defined as the predicted coverage contour for FM stations in Section 73.311 of the Rules.

Upon these principles, the following findings have been derived:

1. There is no gray area within the crescent except a region at the western tip of the crescent located in South Dakota west of the city of Sioux Falls. (This is part of Area A shown in Figure 5 of the engineering statement of November 1967, attached. Also shown as the gray remnant in Figure 1, attached). This gray remnant consists of 219 square miles out of 70,700 total square miles of the crescent, or less than one third of one percent (0.31%) of the total area involved.

2. The total population in this gray remnant consists of 889 persons out of a total rural population within the crescent of 2,165,502 persons, or approximately four one hundredths of one percent (0.041%) of the rural population, or less than two one hundredths of one percent (0.0167%) of the total population of 5,312,300 people. These population figures are based on the 1960 U. S. Census.

3. It must be remembered that this de minimis interference to gray area was based on the 0.25 mv/m criterion which is more stringent than the Commission's Rules require.

The remnant gray area lies in the northern one fourth of the United States. If we recompute the existing ground wave services on the basis of 0.1 mv/m as permitted by Section 73.182(f) of the Rules, this little gray remnant disappears entirely. Indeed, this area is served by two primary AM services, the groundwave signals of WNAX, Yankton, S. D. and KFAB, Omaha, Nebraska.

4. In any event, there is in the FCC Rules, Section 73.150(6) a term known as MEOV, which means maximum expected operating value of radiation of an antenna system. Within the tolerance permitted by MEOV in the direction of the gray remnant, it is possible to adjust the WAIT directional antenna to eliminate the interference to WFAA/WBAP in that area.

Thus we come to the final conclusion that not only is there no white area in the crescent as previously shown; neither is there any gray area.

Incidentally a study was made to determine the existing skywave services to the gray remnant in addition to WFAA/WBAP. There are fifteen such services; nine Class IA and six Class IB. Five are from two to four times as strong as WFAA/WBAP and ten are between equal and twice as strong. This multiplicity of signals to choose between is typical of the rest of the crescent; the details are shown in the November 1967 engineering statement and in the Appendix hereto.

Therefore, every resident of the crescent has a choice of two or more primary services and from 2 to 30 skywave signals.

## A P P E N D I X

This appendix consists of this page, TABLE I, Figures 1, 4 and 5 and the CCBS map, all attached hereto.

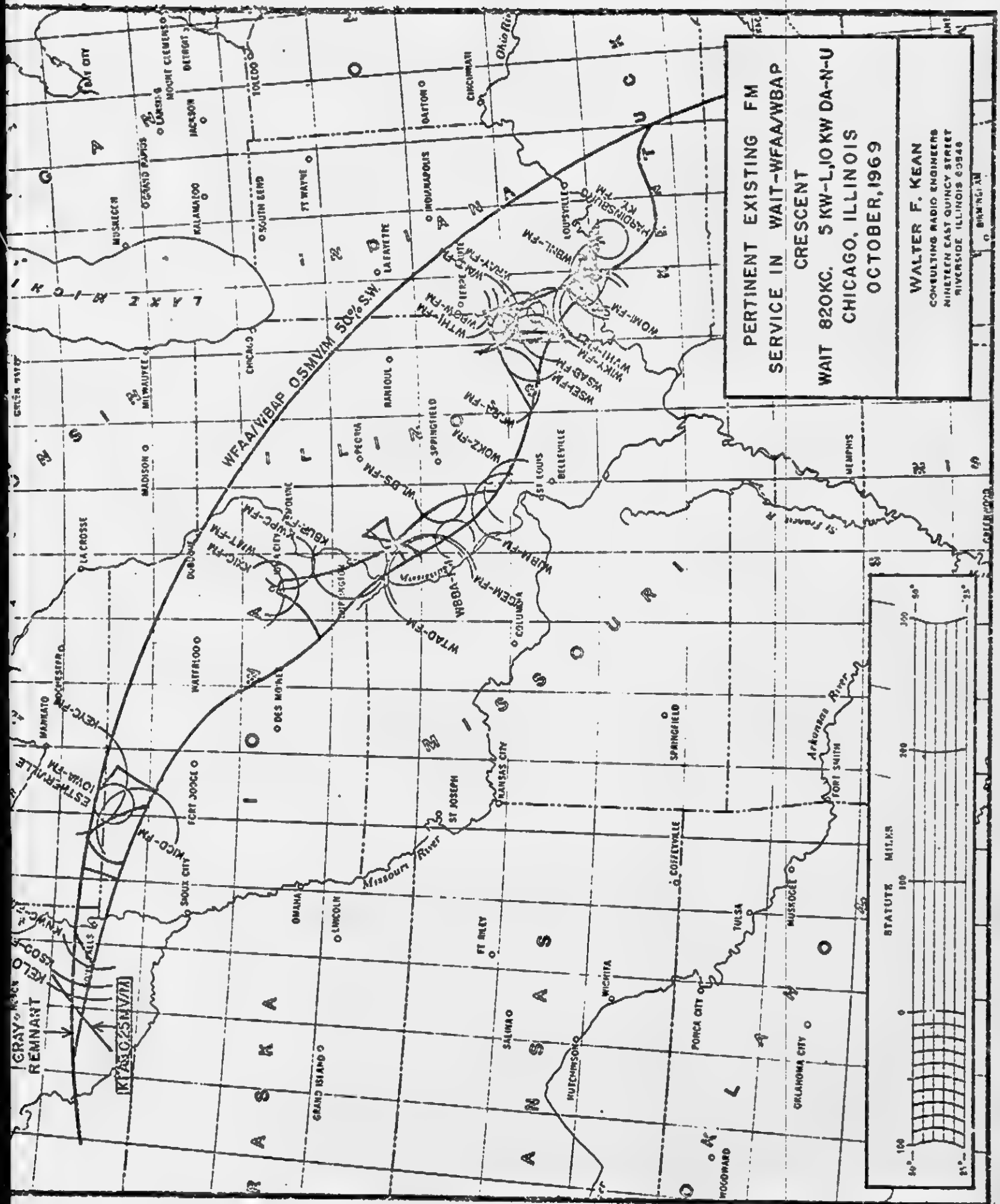
The FM stations considered in this analysis within or adjacent to the crescent are shown in the FCC Official List dated September 1, 1969. From this list the effective radiated power in the horizontal plane, the height above average terrain of the center of radiation and the coordinates of the tower location were taken for each such station. Assuming uniform terrain elevation about each station, the distance to its 1.0 mv/m contour was determined from Figure 1, Section 73.333 of the Rules. The circular 1.0 mv/m contours were plotted on the map of Figure 1. Likewise the 0.25 and the 0.1 mv/m groundwave contours of the Class I stations shown on Figure 4 were computed in accordance with the Rules, as described in the 1967 engineering statement, and plotted.

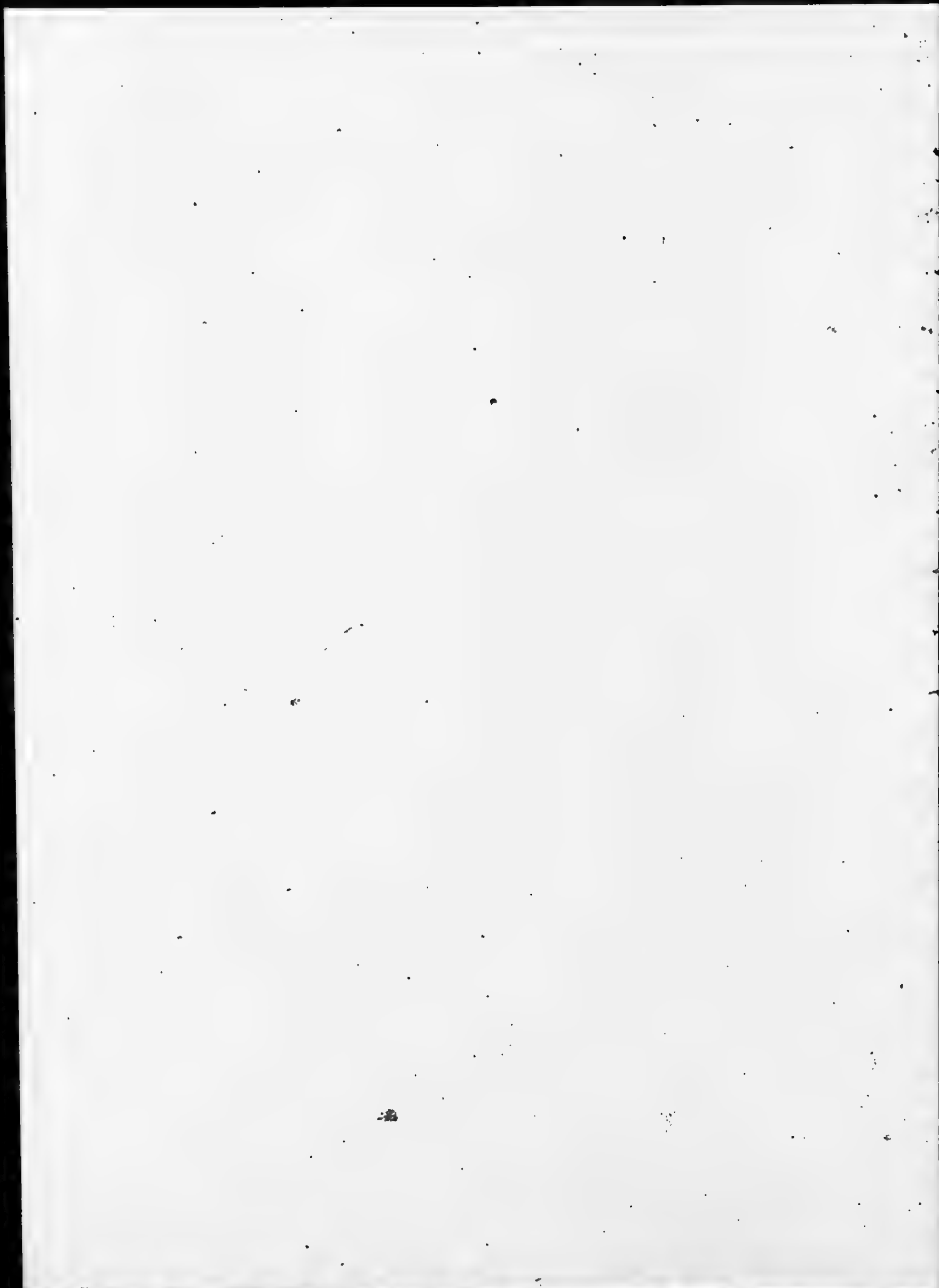
All of the Areas B, C, D and E of Figure 5 and more than half of Area A were covered by FM 1.0 mv/m signals or AM groundwave signals of 0.25 mv/m. When the 0.1 mv/m groundwave of KFAB was added, all of Area A was covered.

TABLE I  
SKYWAVE SERVICES IN AREA A OF FIGURE 5

<u>STATION</u>	<u>DISTANCE</u>	<u>50% TIME SIGNAL</u>	<u>PERCENT OF WFAA/WBAP</u>
KMOX A	520 miles	0.94 mv/m	183%
WCCO A	243	1.64	322%
WHO A	248	1.9	373%
WGN A	535	0.89	175%
WMAQ A	535	0.84	165%
WLS A	535	0.88	173%
WBBM A	535	0.9	177%
WJR A	755	0.51	100%
WHAS A	733	0.54	106%
WLW A	765	0.51	100%
KOMA B	560	0.91	179%
KFAB B	195	1.9	373%
KSTP B	243	1.7	334%
KOA B	475	0.94	183%
KXEL B	290	1.95	383%
KAAY B	685	0.99	195%
WFAA/WBAP A	755	0.51	100%







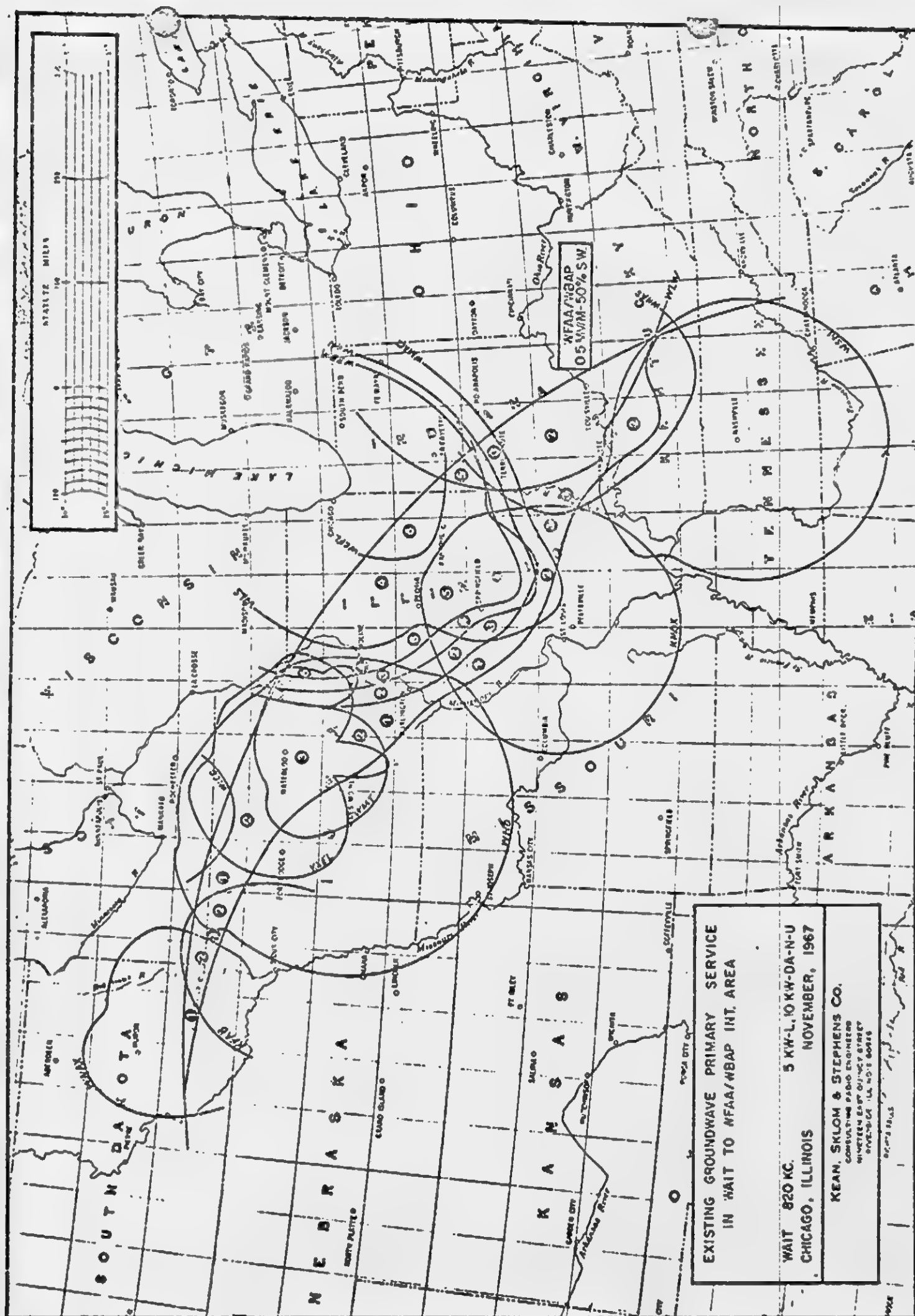


FIGURE 4

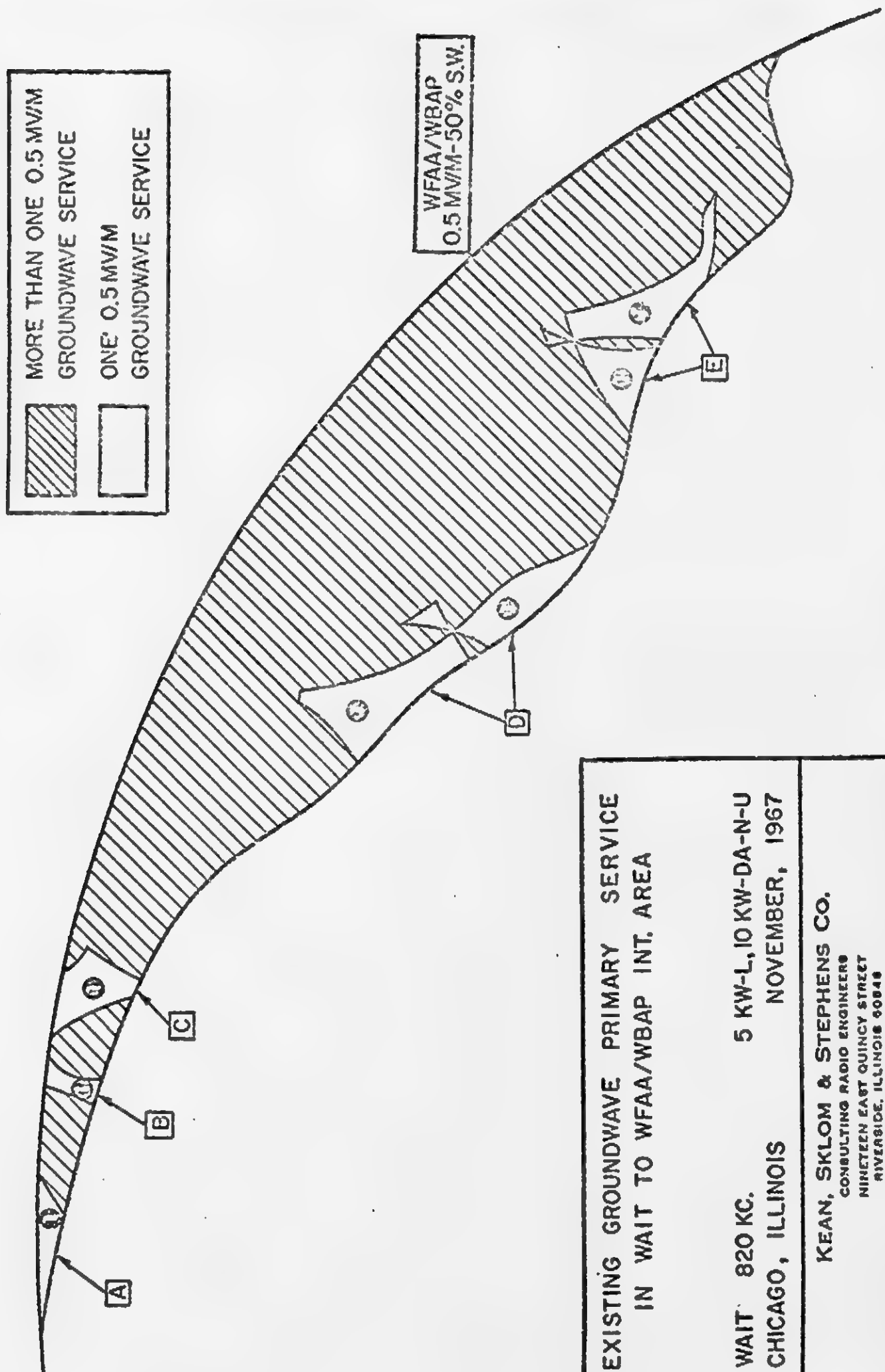
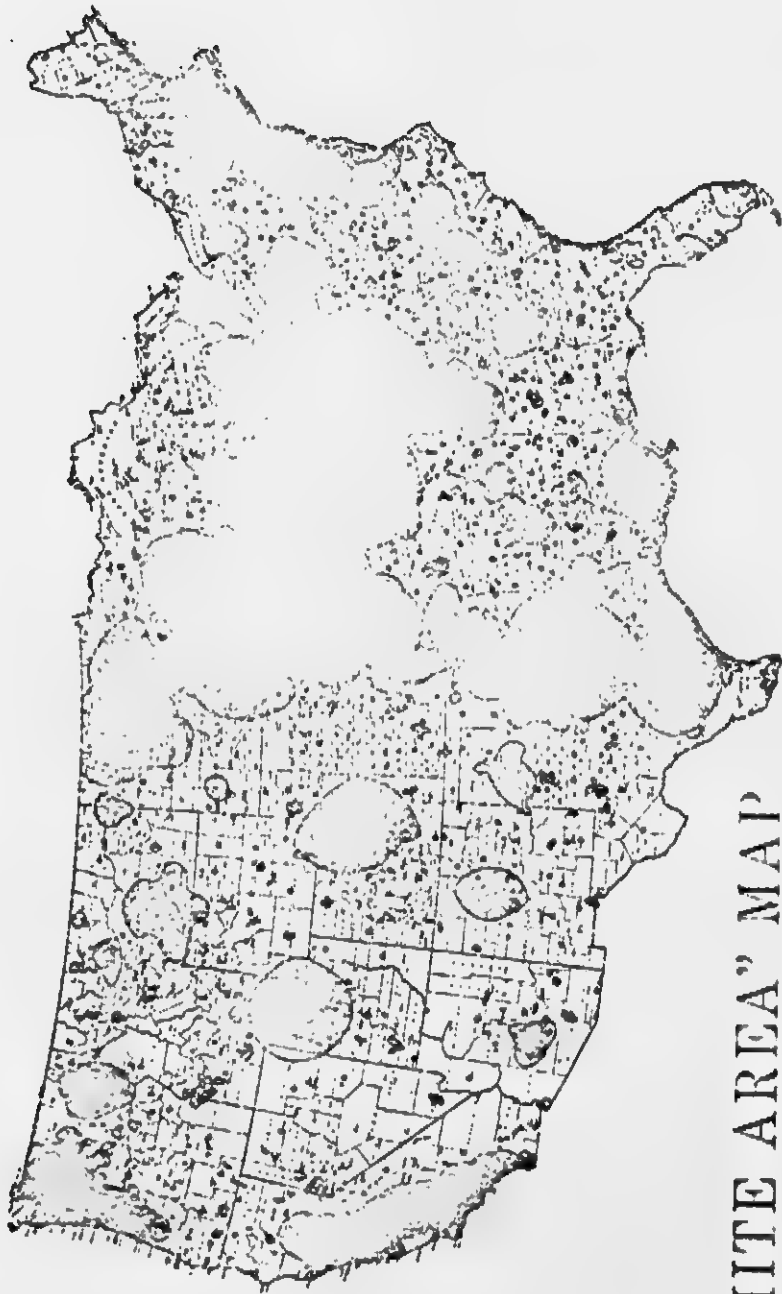


FIGURE 5

U. S. BROADCAST STATIONS (AM)  
540 - 1600 kc




PREPARED BY: C.E.A.S.

JANUARY, 1962

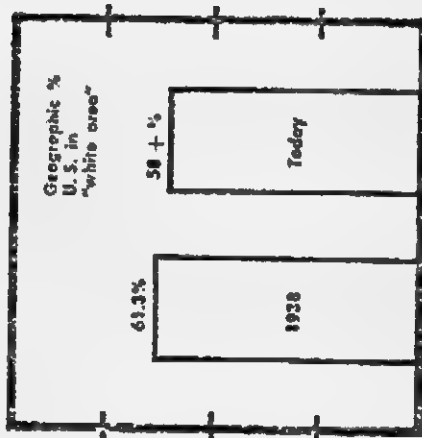
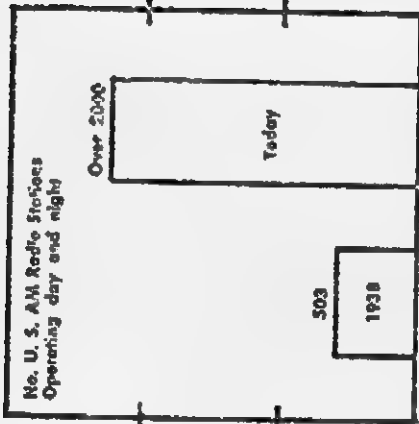


# "WHITE AREA" MAP

## Nighttime Radio Coverage (ALL STATIONS)

-  Clear Channel skywave service provides only listening (no groundwave service available).
-  One groundwave\* service. Clear Channel skywaves provide only choice of programs.
-  Two or more groundwave\* services.  
\*type "B" service

RESIDENTS IN "WHITE AREAS" RELY ON CLEAR CHANNEL STATIONS FOR THEIR ONLY NIGHTTIME SERVICE



Adding more fulltime stations will never provide acceptable radio service to the "white area."

- In 1938, when there were 503 U. S. stations operating day and night, CLEAR CHANNEL stations provided the only nighttime AM radio listening to 61.3% of the nation's land area.
- In 1961, when 1919 radio stations were operating day and night, CLEAR CHANNEL stations provided the only nighttime AM radio listening to over 25 million people residing in 58.0% of the nation's land area. Today, with over 2000 fulltime stations broadcasting, the picture remains largely unchanged.
- Keeping CLEAR CHANNELS clear and adequately powered is the only possible way to provide listenable AM radio service to ALL AMERICA.

In the Matter of )

Maurice Rosenfield, Lois J. Rosenfield,  
Harold A. Weiss, Robert G. Weiss, and  
Devos, Shadur, Mikva and Plotkin, a  
Co-Partnership d/b as WAIT RADIO (WAIT)  
Chicago, Illinois )

Has: 820kc, 5kw, L-SS, Dallas, Texas )  
Requests: 820kc, 10kw, 5kw-LS, DA-N, U )

For Construction Permit )

MEMORANDUM OPINION AND ORDER

Adopted December 17, 1969 ; Released December 23, 1969

By the Commission:

1. The Commission has before it for consideration a Request for Specification of Issues and Petition for Oral Presentation filed by WAIT Radio on October 21, 1969. Also before the Commission at this time is a decision of the United States Court of Appeals for the District of Columbia Circuit, No. 21,689, decided June 24, 1969, remanding the case for further consideration by the Commission. 1/ WAIT contends, as the basis for its request, that the Court's decision "necessarily contemplates a fresh examination by the Commission of the merits of the waiver request," and that it should be allowed to place before the Commission oral arguments and additional evidence focused upon the issues to be considered by the Commission. WAIT also requests, pursuant to Section 1.41 of the Commission's

---

1/ WAIT is seeking authority to extend its hours of operation from limited time to unlimited time on its frequency of 820 kilocycles. In a Memorandum Opinion and Order adopted on October 25, 1967, we denied the applicant's request for waiver and petition for oral presentation, FCC 67-1174, 10 FCC 2d 481, 11 RR 2d 603, and on January 24, 1968, we denied WAIT's petition for reconsideration. Memorandum Opinion and Order, FCC 68-83, 11 FCC 2d 547. The majority of the Court found that the Commission's treatment, in denying the action requested by WAIT, "...believes the 'hard look' the application merited," and stated that "we do not rule on substantive contentions, but remand for further consideration."



Rules, that the Commission specify the issues it considers relevant to its reconsideration of the waiver request. 2/

2. WAIT has already submitted extensive engineering and other data to show that its proposed nighttime operation would not cause interference with Stations WBAP-WFAA in Fort Worth/Dallas within any "white area" lacking primary nighttime service. Indeed, in its application, the amendments thereto, its petition for reconsideration, and its briefs and arguments before the Court of Appeals, WAIT has presented extensive material and argument in support of its request for the nighttime authorization. In this request, WAIT alludes to and repeats some of these arguments. In addition, it enumerates what it describes as "varying possible grounds for denying a waiver" to which, it states, the Commission's brief and statements by the Commission's staff have alluded. Observing that it has already submitted evidence which it believes bars reliance on any of the grounds for denial of a waiver, WAIT nevertheless suggests that "it might be desirable to introduce additional evidence if the Commission now considers any of them relevant," and, more specifically, it requests permission to submit new evidence with respect to "gray areas" bearing on its proposal. WAIT goes on to express its belief that the further consideration directed by the Court can only be carried out if it (WAIT) is allowed to provide focused support for its waiver request and, at the same time, assist the Commission in according its request the required "hard look."

3. To put WAIT's assertions in perspective it should be noted that the Court's opinion, pursuant to which this proceeding is being conducted, stated:

"...We hold that the Commission must state its basis for decision with greater care and clarity than was manifested in its disposition of WAIT's claims, and remand for a clearer statement of reasons."

The remand order thus does not require that WAIT be afforded the opportunity to supplement its waiver request. Nonetheless, if there is new data which it wishes to submit, the Commission will consider it, together with any comments in response thereto, in accordance with Sections 1.41 and 1.45 of the Commission's Rules.

4. We do not believe it would be useful, however, to specify, as WAIT requests, those questions which the Commission considers relevant to the waiver request. To obtain an exemption an applicant must "set forth reasons sufficient if true, to justify... a waiver of the rules." United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). The applicant itself is in the best position to determine what special reasons

---

2/ Section 1.41 provides for requests for action which may be submitted informally where formal procedures are not required.



exist for giving its proposal more favorable consideration than that provided for by the rules. The Reports and Orders issued when the pertinent rules were adopted and subsequent opinions construing and applying them afford sufficient guidance for the formulation of such requests. In addition, our two opinions in this case (See f.n. 1, supra) as well as the brief filed on behalf of the Commission in the Court proceeding fairly delineate the areas of new concern with respect to WAIT's proposal. Thus, while as indicated already, we would consider any new showing WAIT desires to offer we do not specify any particular points to which it should address itself. Cf. Rio Grande Family Radio Fellowship, Inc. v. F.C.C., 406 F.2d 664 (D.C. Cir., 1969).

5. Finally, there is the matter of WAIT's request for oral argument. Although we do not ordinarily hear argument in connection with waiver requests, and although this particular kind of waiver request is not unusual, the circumstances of this case are sufficiently different to warrant departure from our usual practices. Therefore, as part of our further consideration of the application, and of the "hard look" which the Court stated the application merited, we will permit WAIT to present its case orally before the Commission en banc before we again rule on its requests for waiver. We will also permit the intervenors in this proceeding to present their arguments against the WAIT proposal.

6. Accordingly, IT IS ORDERED, That the request of WAIT Radio for specification of issues IS DENIED.

7. IT IS FURTHER ORDERED, That the request of WAIT Radio for authority to file additional material IS GRANTED, and that such material or pleading be filed within 30 days of the date of this Order.

8. IT IS FURTHER ORDERED, That oral argument IS SCHEDULED before the Commission en banc, on February 9, 1970, beginning at 9:30 A.M. Subject to the filing within 21 days from the release of this Order, of a written notice of intention to appear and participate, the parties ARE AUTHORIZED to present oral argument as follows:

- (a) WAIT Radio -  $\frac{1}{2}$  hour, and
- (b) Carter Publications, Inc. (WBAP);  
A. H. Belo Corporation (WFAA);  
Midwest Radio Television, Inc. (WCCO);  
and Clear Channel Broadcasting Services -  
a total of  $\frac{1}{2}$  hour.

9. IT IS FURTHER ORDERED, That within group (b) above, the parties are authorized to specify the time to be allotted to each for oral argument; if agreement as to the allocation of time is reached, the

Commission shall be advised of the provisions thereof at least ten calendar days prior to the date of oral argument; and if agreement cannot be reached, the time shall be divided equally among the parties in the group. WAIT Radio may, if it wishes, reserve a portion of its time for rebuttal.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple  
Secretary

PAUL, WEISS, GOLDBERG, RIFKIND, WHARTON & GARRISON  
1775 K STREET, N. W.  
WASHINGTON, D. C. 20006  
TELEPHONE: 202 293-6370  
CABLE: LONGSIGHT WASHINGTON

NEW YORK OFFICE  
345 PARK AVENUE  
NEW YORK, N. Y. 10022  
TELEPHONE: (212) 935-8000  
CABLE: LONGSIGHT N. Y.

February 4, 1970

Mr. Ben F. Waple  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Dear Mr. Waple:

The Memorandum Opinion and Order of the Commission dated December 23, 1969, granted WAIT Radio permission to file additional material relevant to its application for a waiver of the clear-channel rules "within thirty days." By order of January 22, 1970, the Commission extended the deadline for the filing of such material until February 5.

Twenty copies of a Supplemental Engineering Statement by Walter F. Kean are enclosed for a consideration by the Commission in its further examination of WAIT Radio's waiver application. This engineering statement, dated January 29, 1970, demonstrates not only that nighttime broadcasting by Station WAIT would not create objectionable interference with Station WFAA/WBAP in any white area, but also that no interference would be created in any gray area within the "crescent." When FM service is considered, 100% of the people living in that area receive two or more stations, and more than 95% receive three or more stations.

The Supplemental Engineering Statement also shows that WAIT would not create any significant interference with WFAA/WBAP's signal beyond the 0.5 mv/m 50% skywave contour, that Station WAIT's directionalized coexistence would not create any so-called "lateral interference" with stations on adjacent channels, that the concept of the "normally protected contour" offers no guidance or standard for decision in passing upon this waiver request, that a grant of Station WAIT's application would not add to nighttime congestion on the AM radio band, and, finally, that the possibility of super-power authorizations is so remote, and the concept so impracticable, that the possibility of such authorizations could not justify a denial of Station WAIT's application.

BEST COPY  
from the original

Mr. Ben F. Waple  
Washington, D.C. 20554

February 4, 1970  
Page Two

Also enclosed are twenty copies of reports by Pulse, Incorporated and the American Research Bureau showing that no significant number of people listen to WFAA/WBAP in areas surveyed in Pennsylvania, South Dakota, Wyoming and Montana. Indeed, the ARB report shows that no surveyed listeners in the Pennsylvania areas reported diary entries for WBAP/WFAA.

Sincerely,

*William J. Dempsey*

Ramsey Clark

*Ramsey Clark*

RC:dmc

cc: Herbert M. Schulkind, Esquire  
Counsel for Midwest Radio-TV

Michael Finkelstein, Esquire  
Counsel for Carter Publications, Inc. (WBAP)

William J. Dempsey, Esquire  
Counsel for A. H. Belo Corp. (WFAA)

Russell Egan, Esquire  
Counsel for Clear Channel Broadcasting Service

Chief, Broadcast Bureau

[Certificate of Service Omitted in Printing]

SUPPLEMENTAL  
ENGINEERING STATEMENT FOR  
RADIO STATION W A I T  
CHICAGO, ILLINOIS  
January 29, 1970

SUPPLEMENTAL  
ENGINEERING STATEMENT FOR  
RADIO STATION W A I T  
CHICAGO, ILLINOIS  
January 29, 1970

This engineering statement has been prepared for WAIT Radio, licensee of radio station WAIT, Chicago, Illinois. At present, WAIT operates on 820 kc., 5,000 watts power, employing a non-directional antenna, limited time.

On March 6, 1967 WAIT tendered for filing an application for authority to operate additionally with 10,000 watts power at night, directional antenna, on 820 kc, at a separate site during nighttime hours (but with 5,000 watts, non-directional, as at present from the existing site during daytime hours). WAIT later submitted a Petition For Reconsideration. Those documents contain engineering statements prepared and signed by this writer dated respectively January 10, 1967 and November 24, 1967, both of which show and discuss a crescent-shaped "WAIT to WFAA/WBAP Interference Area," referred to hereafter for convenience as the crescent.

The principal purpose of those inquiries was to determine whether there would be any interference from a directionalized nighttime operation so proposed to any white area located within the 0.5 mv/m 50% time skywave contour of WFAA/WBAP. The engineering

statements demonstrated that no interference to any white area would occur -- that is, there was no white area at all within the crescent.

Following the release of FCC Order No. 69-960, dated September 4, 1969, Docket No. 18651, which proposes the unification of AM and FM broadcasting into a single aural service, among other things, an additional engineering statement was prepared for WAIT by this writer, dated October 23, 1969, which demonstrated that there is no grey area either within the crescent -- that is, throughout the entire crescent every rural resident receives at least two primary (AM or FM) aural services at night.

This supplemental engineering statement consists of six parts amplifying or explaining engineering data in my previous statements in response to questions asked me by WAIT. These six parts are respectively:

- I. An analysis to determine how much of the area and rural population in the crescent in actuality receive more than two local primary services.
- II. An analysis of the extent and significance of any interference beyond WFAA/WBAP's 0.5 mv/m 50% skywave contour arising from WAIT's co-existence on the channel.
- III. An analysis of whether WAIT's directionalized co-existence



on 820 kc with WFAA/WBAP at night as proposed would create any so-called "lateral interference" to stations on adjacent channels.

- IV. An analysis from an engineering point of view of the significance today of what is commonly referred to as the concept of the "normally protected contour."
- V. An analysis of whether the granting of a waiver here would add to nighttime congestion on the AM band or violate any Commission policy with respect to the deterioration of nighttime AM services through the addition of new nighttime services.
- VI. A comment on the effects on existing services if super-power were ever permitted in AM radio.

\* \* \* \* \*

# I. MULTIPLE GROUNDWAVE SERVICES IN THE CRESCENT.

In my previous engineering statements I have shown, as indicated, that there is neither white area nor grey area within the crescent -- that is, viewing both AM and FM as a single aural service, every rural resident and area in the crescent receives at least two primary services at night. I have now been asked to report to what extent the crescent is served by more than two primary aural services at night. The results of my inquiry are set forth in the table below:

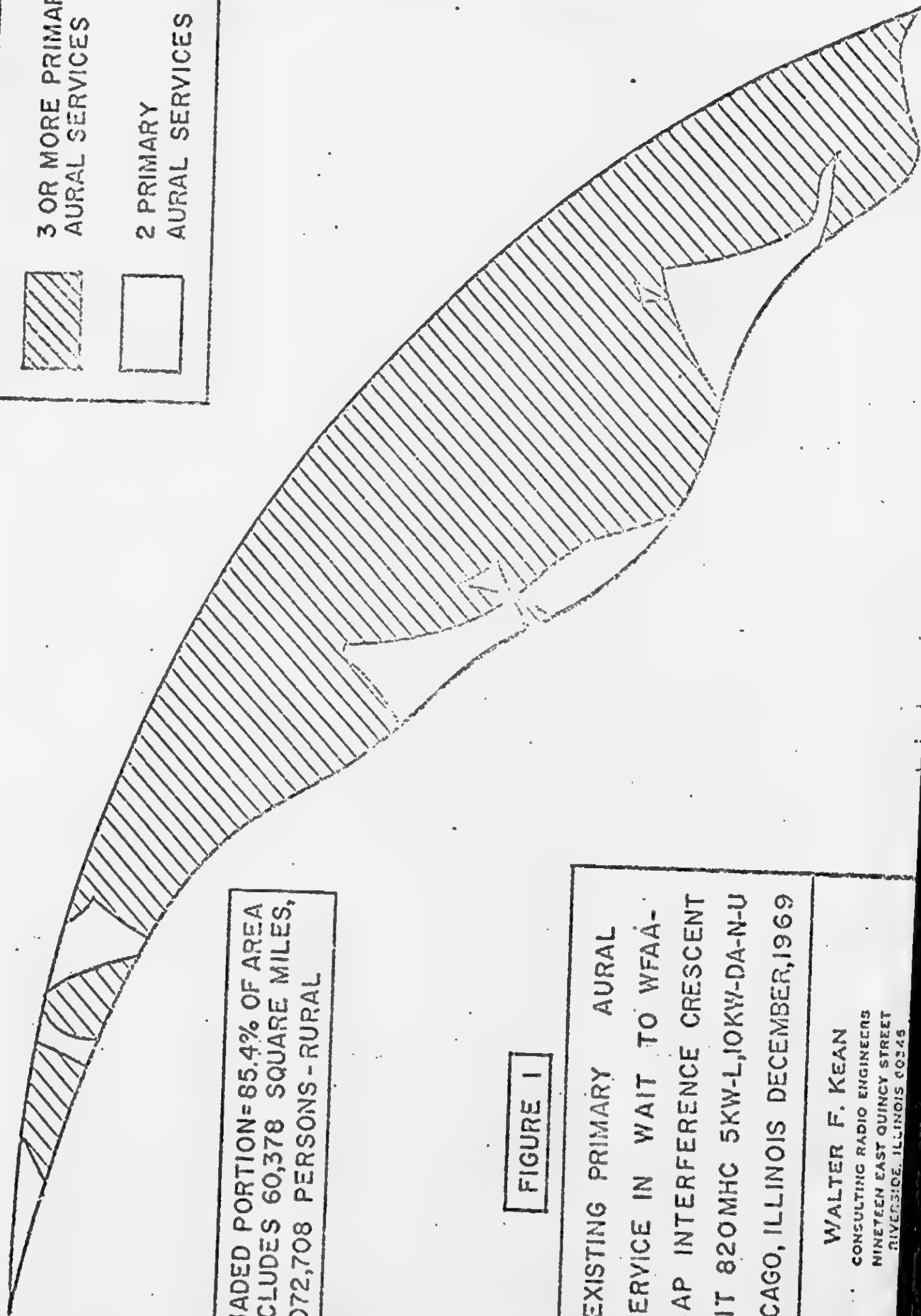
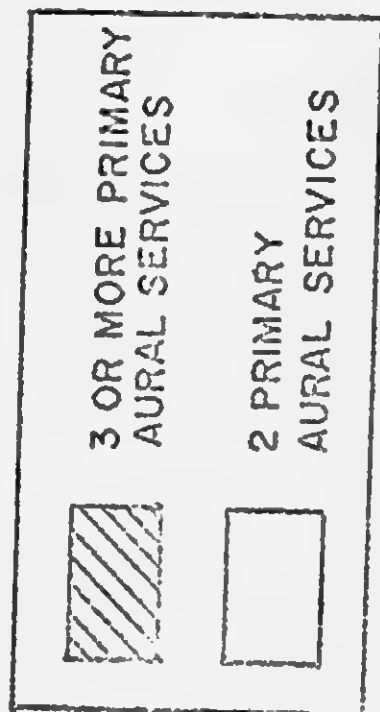
<u>No. of Local Stations</u>	<u>Area</u>	<u>Population</u>
4 or more	36,340 sq.mi. 51.4%	1,293,320 59.7%
3 or more	60,378 85.4	2,072,708 95.7
2 or more	70,700 100.0	2,165,502 100.0

Primary aural services are: AM interference-free groundwave signal of 0.1 mv/m or greater (FCC Sec. 73.182 f) and FM signals of 1.0 mv/m or greater (FCC Sec. 73.311 a).

Attached hereto are three maps, designated as Figures 1, 2 and 4 which graphically illustrate the above findings. Figure 4 has previously been filed under that number with my Engineering Statement of November 24, 1967, and is reproduced in the Joint

Appendix in the U. S. Court of Appeals Case No. 21,689 (hereafter referred to as the Joint Appendix) at page 156.

The areas designated "1" in Figure 4 have been shown to receive two primary aural services at night. By the same principles set forth in my October 23, 1969 statement, it has been determined that the areas marked "2" in Figure 4 receive at least three primary aural services. The unshaded areas of Figure 1 are "1" of Figure 4 and the unshaded areas of Figure 2 are "1" and "2" of Figure 4 combined.

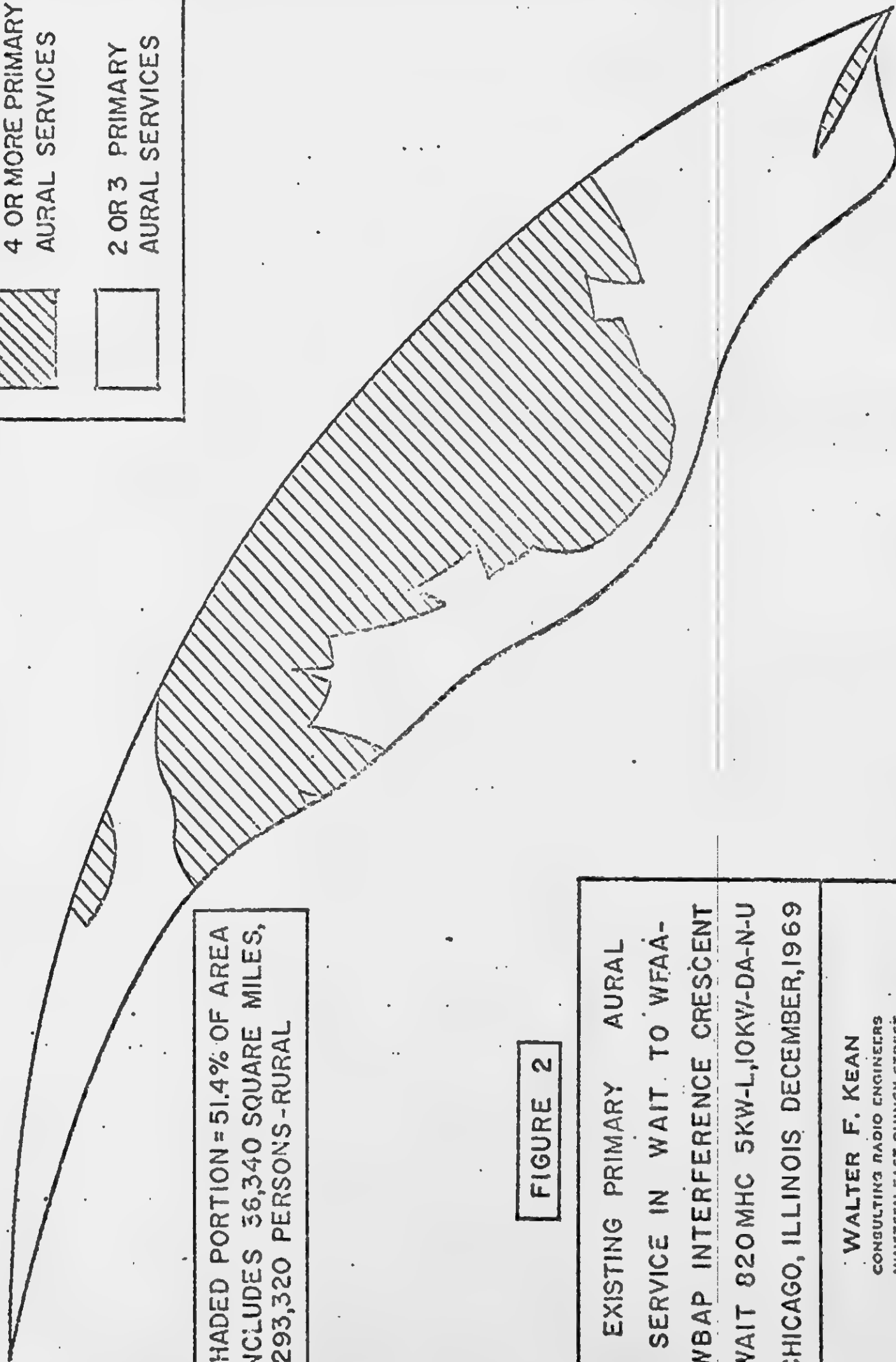
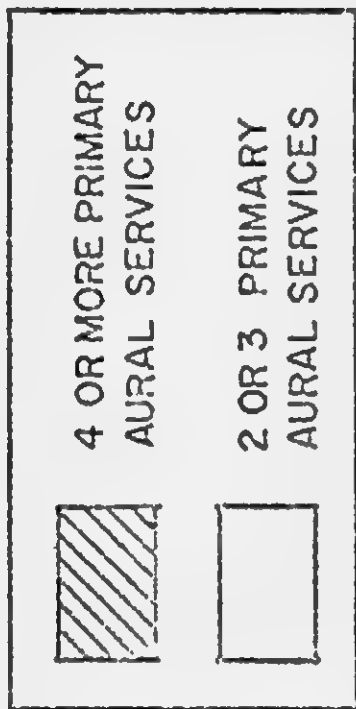


SHADED PORTION=65.4% OF AREA  
INCLUDES 60,378 SQUARE MILES,  
2,072,708 PERSONS - RURAL

FIGURE 1

EXISTING PRIMARY AURAL  
SERVICE IN WAIT TO WFAA-  
WBAP INTERFERENCE CRESCENT  
WAIT 820MHC 5KW-LJOKY-DA-N-U  
CHICAGO, ILLINOIS DECEMBER, 1969

WALTER F. KEAN  
CONSULTING RADIO ENGINEERS  
NINETEEN EAST QUINCY STREET  
RIVERSIDE, ILLINOIS 60345



SHADED PORTION = 51.4% OF AREA  
INCLUDES 36,340 SQUARE MILES,  
1,293,320 PERSONS-RURAL

FIGURE 2

EXISTING PRIMARY AURAL SERVICE IN WAIT TO WFAA- WBAP INTERFERENCE CRESCENT WAIT 820MHC 5KW-LJOKY/-DA-N-U CHICAGO, ILLINOIS DECEMBER, 1969	WALTER F. KEAN CONSULTING RADIO ENGINEERS NINETEEN EAST QUINCY STREET RIVERSIDE, ILLINOIS 60546
---	--

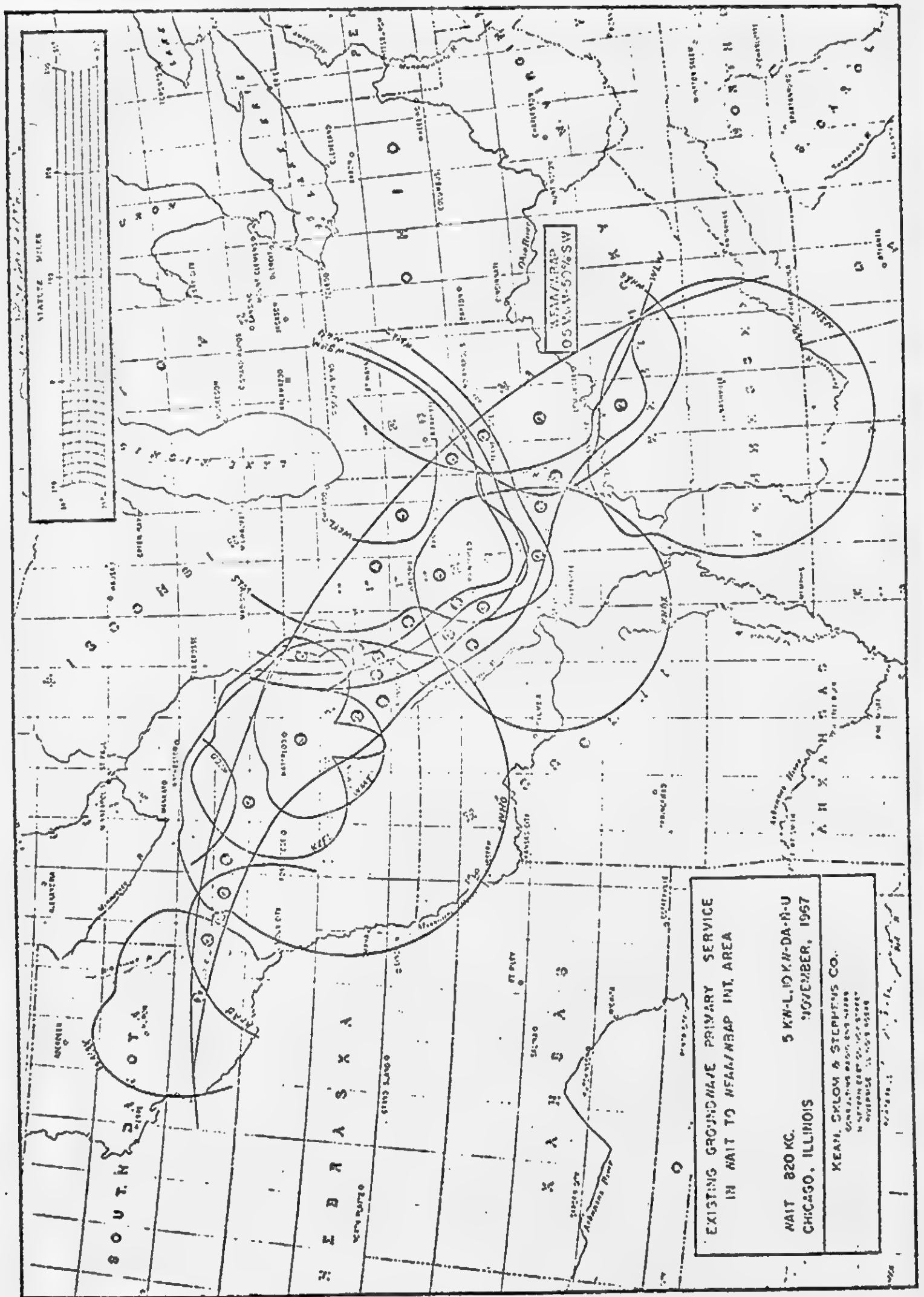


FIGURE 4

II. INTERFERENCE BEYOND THE 0.5 MV/M 50% TIME  
SKYWAVE CONTOUR OF WFAA/WBAP ON 820 KC.

I have been asked to report on the extent of objectionable interference, if any, from WAIT's proposed nighttime operation beyond the 0.5 mv/m 50% time skywave contour of WFAA/WBAP and to report also on the significance of any such interference. There are three parts to my answer.

(1) Under Commission rules, no protection is afforded to the signal of WFAA/WBAP beyond the 0.5 mv/m 50% time skywave contour. Section 73.182(a)(1)(i) of the Rules specifically limits the nighttime protection of Class I stations such as WFAA/WBAP as follows:

"Nighttime: To the 0.5 mv/m, 50 percent skywave contour from stations on the same channel,...."

(2) For a substantial area beyond the 0.5 mv/m, there will in fact be no interference at all from WAIT's proposed nighttime operation to WFAA/WBAP -- i.e., the ratio of WAIT's signal to WFAA/WBAP would not exceed 1 to 20. This area in which no objectionable interference at all will occur is the area south of a line from Sioux Falls, South Dakota to Tacoma, Washington, which includes the heart of the northwest segment of the United States.



(3) In the remainder of the area outside the 0.5 mv/m 50% time skywave contour of WFAA/WBAP, the interference has no significance. In all that area, there is a multiplicity of other Class I skywave signals all greater than 0.5 mv/m 50% time and therefore stronger than and superior to the WFAA/WBAP signal.

This last conclusion requires some amplification. To evaluate comparatively other skywave signals available on frequencies other than 820 kc, for purposes of this analysis, three locations have been selected as fairly representative of the entire area involved. One of the three is near the WFAA/WBAP 0.1 mv/m contour, one just beyond their 0.5 mv/m skywave contour, and the third at the mean between these two or near the 0.25 mv/m skywave contour, in each case of WFAA/WBAP in the northern half of the United States. Location No. 1, near the 0.1 mv/m contour, is near Lewisburg, Pennsylvania at Latitude  $41^{\circ}\text{N}$ , Longitude  $77^{\circ}\text{W}$ ; Location No. 2, just beyond the 0.5 mv/m contour, is near Pierre, South Dakota at Latitude  $44^{\circ}\text{N}$ , Longitude  $101^{\circ}\text{W}$ ; and Location No. 3, near the 0.25 mv/m contour, is near Sheridan, Wyoming at Latitude  $45^{\circ}\text{N}$ , Longitude  $107^{\circ}\text{W}$ . After selecting these three locations as representative, I then made an investigation to determine the skywave services available at each. Tables I, II and III which follow give the details of the other skywave services available at

Locations 1, 2 and 3. The areas surrounding each of these three locations are shown, by county, in Table IV.

TABLE I

SKYWAVE SERVICES AT LOCATION NO. 1 NEAR LEWISBURG, PENNSYLVANIA, LATITUDE 41°N, LONGITUDE 77°W.

<u>STATION</u>		<u>DISTANCE</u>	<u>50% TIME SIGNAL</u>	<u>PERCENT OF WFAA/WBAP</u>
KMOX	A	710 mi.	0.619mv/m	529%
WSB	A	640	0.632	540
WSM	A	635	0.658	562
WHAS	A	490	0.973	832
WLW	A	405	1.082	925
WJR	A	330	1.211	1035
WHAM	A	145	1.205	1030
WKYC	A	245	1.656	1415
WBZ	A	325	1.685	1440
WNEC	A	160	1.224	1046
WABC	A	160	1.224	1046
WCBS	A	160	1.372	1173
WCAU	A	130	1.235	1056
WMAQ	A	575	0.674	576
WLS	A	575	0.689	589
WBBM	A	575	0.720	615
WGN	A	575	0.723	618
KDKA	A	160	1.537	1314
WQXR	B	160	0.504	431
WKBW	B	165	1.440	1231
WGY	B	195	0.926	791
WWVA	B	205	1.965	1679
KYW	B	115	1.504	1285
WCFL	B	575	1.153	985
WOR	B	160	0.914	781
WOWO	B	440	1.136	971
WCKY	B	425	0.906	774
WBT	B	455	1.391	1188
WRVA	B	250	0.911	779
WFAA/WBAP		1240	0.117	100

WAIT proposed 10% time skywave = 0.85 mv/m

TABLE II

SKYWAVE SERVICES AT LOCATION NO. 2 NEAR PIERRE, SOUTH DAKOTA, LATITUDE 44°N, LONGITUDE 101°W.

<u>STATION</u>		<u>DISTANCE</u>	<u>50% TIME SIGNAL</u>	<u>PERCENT OF WFAA/WBAP</u>
WMAQ	A	680 mi.	0.579 mv/m	132%
WGN	A	680	0.621	142
WBBM	A	680	0.619	142
WLS	A	690	0.606	139
KMOX	A	680	0.618	141
WHO	A	420	1.286	294
WCCO	A	380	1.162	266
KSL	A	610	0.773	177
KAAY	B	805	0.688	157
KXEL	B	460	1.708	391
KSTP	B	405	1.658	379
KFAB	B	320	1.896	434
KOA	B	360	1.161	266
KOMA	B	630	0.856	196
WFAA/WBAP		800	0.437	100

WAIT proposed 10% time skywave = 0.016 mv/m

TABLE III

SKYWAVE SERVICES AT LOCATION NO. 3 NEAR SHERIDAN, WYOMING,  
LATITUDE 45°N, LONGITUDE 107°W.

<u>STATION</u>		<u>DISTANCE</u>	<u>50% TIME SIGNAL</u>	<u>PERCENT OF WFAA/WBAP</u>
WHO	A	730 miles	0.641 mv/m	272%
WCCO	A	675	0.634	269
KSL	A	388	1.23	521
KOYA	B	830	0.633	268
KXFL	B	760	0.775	323
KSTP	B	688	1.62	586
KFAB	B	620	0.944	400
KOA	B	380	1.11	475
WFAA/WBAP		1000	0.236	100

WAIT proposed 10% time skywave = 0.011 mv/m

TABLE IV

## COUNTIES SURROUNDING LOCATIONS 1, 2 AND 3.

Location No. 1

Pennsylvania:	Warren	McKean	Columbia
	Bradford	Susquehanna	Perry
	Cameron	Clinton	Adams
	Union	Montour	Northumberland
	Huntingdon	Mifflin	Franklin
	Cumberland	Fulton	Greene
	Potter	Tioga	Juniata
	Forest	Elk	
	Lycoming	Sullivan	

Location No. 2

South Dakota:	Hughes	Sully
	Potter	Ziebach
	Stanley	Haakon

Location No. 3

Wyoming:	Big Horn	Washaki
	Sheridan	Johnson
Montana:	Powder River	Rose Bud
	Yellowstone	Big Horn

Locations Nos. 1, 2 and 3 are all located in white area regions shown in the Clear Channel Broadcasting Service Map which was included as an Appendix to my October 23, 1969 Engineering Engineering Statement.

Table I shows that at Location No. 1 there are 29 Class I-A and I-B skywave services with an intensity greater than 0.5 mv/m 50% time. They vary from 5 to 16 times as strong as the WFAA/WBAP signal intensity of 0.117 mv/m 50% skywave at the same location. Table II shows that at Location No. 2 there are 14 skywave services from other Class I stations all with an intensity in excess of 0.5 mv/m, as compared with WFAA/WBAP's signal intensity at the same point of 0.437 mv/m. They range up to 4 times as strong as the signal of WFAA/WBAP. Table III shows that at Location No. 3 there are 8 skywave signals from other Class I stations each in excess of 0.5 mv/m as compared with a signal intensity of WFAA/WBAP of 0.236 mv/m. They range up to nearly 6 times as strong as the WFAA/WBAP skywave signal at the same point.

Any other locations beyond the 0.5 mv/m skywave contour of WFAA/WBAP would also show that there is a multiplicity of other skywaves superior to that of WFAA/WBAP.



For the stations listed in Table I, II and III, whose contours are shown in Figures 2 and 3 of my Engineering Statement of November 24, 1967 (Joint Appendix, pp.154-55), the radiated fields were taken from the FCC Official List for non-directional antennas, and from the published proof of performance measured patterns for the directional antennas. For all stations, the directions to the specified three locations were determined from the #3060 U. S. map and the distances were measured on the FCC M3 map of Section 73.190 of the Rules. For these distances the minimum pertinent radiation angles were calculated from Figure 5 of that section using the published tower heights. For the directional operations the pertinent elevation angle radiations were calculated as a percentage of the horizontal plane radiations, based on the theoretical parameters of each pattern. The 50% time skywave field intensity at the three locations were calculated using Figure 1a of Section 73.190.

### III. ADJACENT CHANNEL INTERFERENCE.

I have been asked to report on whether WAIT's nighttime operation on 820 kc as proposed would create any objectionable interference to services on adjacent channels.

As to possible groundwave interference, my Engineering Statement of January 10, 1967 shows that WAIT's operation as proposed would not create any objectionable groundwave interference either on the same or any of the three adjacent channels on each side of 820 kc, or within a total span of seven channels. (See FCC Rules, Section 73.37(a) for groundwave considerations.)

As to possible skywave interference to adjacent channels, it must be remembered that the skywaves only of Class I stations are ever protected at all from interference. However, the FCC Rules provide specifically in Section 73.182(a)(1) that even the skywaves of the Class I stations are "not protected from adjacent channel interference."

I have carried the analysis of the skywave problem further. I have examined closely two typical and representative locations, one at 46°N, 90°W, near Mercer, Wisconsin, and the other at 45°N, 85°W, near Gaylord, Michigan, both in white areas as shown in the CCBS map included as an appendix to my October 23, 1969

Engineering Statement. The relative signal intensity at night of WAIT under its proposed directionalized nighttime service on 820 kc and of the Class I stations on the closest adjacent channels of 830 kc and 810 kc are shown in the following tables:

Location near Mercer, Wisconsin

<u>STATION</u>	<u>FREQUENCY</u>	<u>DISTANCE</u>	<u>SKYWAVE SIGNAL INTENSITY</u>	
WCCO	830 kc	172 miles	1.26 mv/m	50% time
WAIT	820	317	1.47	10%
KGO	810	1758	* 0.034	50%
WGY	810	838	0.387	50%

Location near Gaylord, Michigan

WCCO	830 kc	410 miles	1.09 mv/m	50% time
WAIT	820	270	2.17	10%
KGO	810	1977	* 0.026	50%
WGY	810	573	0.774	50%

\* Service nullified by WGY interference

Section 73.182(a) (1) provides that a non-objectionable interference area may be considered to exist where the ratio of desired 50% skywave to undesired adjacent groundwave signal is 1 to 4.

The above table shows that the WAIT skywave 10% signal does not exceed 4 times the 50% skywave of WCCO and could not be considered interference area to WCCO even if it were WAIT's groundwave signal.

The tabulated values above for KGO and WGY show that the same conclusion applies with respect to 810 kc.

#### IV. NORMALLY PROTECTED CONTOUR.

I have also been asked to report on the significance today from an engineering standpoint of the Commission's concept of "normally protected contour" of a radio station.

For a Class II station such as WAIT, the rules recommend that the normally protected contour is the 2.5 mv/m contour. This describes the area in which the station's signal strength equals or exceeds that level.

Under the proposed directionalized operation of WAIT at night on 820 kc, the 2.5 mv/m contour would fall as mapped in Figure 8 of my Engineering Statement of January 10, 1967 (Joint Appendix, p. 69). The interference-free signal contour of 20.6 mv/m is mapped in Figure 7 of the same Engineering Statement (Joint Appendix, p. 68). Although the interference-free contour of the proposed operation of WAIT covers a 465 square mile area in which 4.4 million people reside in metropolitan Chicago, it falls short of the areas and populations within the 2.5 mv/m normally protected contour. In the area between the two contour lines of 20.6 mv/m and 2.5 mv/m, WAIT's proposed nighttime groundwave signal would receive interference from the WFAA/WBAP skywave. While this area is outside the WFAA/WBAP 0.5 mv/m (50%)

skywave contour, WAIT's groundwave receives interference because its signal strength does not exceed 20 times the WFAA/WBAP (10%) skywave.<sup>\*/</sup> See Section 73.182(o) and (v).

The difference between the areas and populations of these two contours has no significance today in the light of the following:

(1) Since 1946 the Commission has virtually ignored the nighttime normally protected contour concept. Almost all of the nighttime Class II and Class III grants made in this 24-year period have been made with nighttime interference-free contours up to more than 10 times the normal protection value. For example, Radio Station WBEL, South Beloit, Illinois, 5 kilowatts, DA-N, by power and frequency a Class III-A station with 2.5 mv/m night normal protection value, was granted with an actual nighttime interference-free contour of 28.0 mv/m which is caused by the

---

<sup>\*/</sup> The nature of the interference to WAIT between the 20.6 and the 2.5 mv/m contours may accurately be described as virtually zero at the 20.6 mv/m contour and gradually increasing at points located successively further from the WAIT transmitter. It is untrue that no one outside WAIT's proposed 20.6 mv/m nighttime contour would receive satisfactory service from it. It is therefore inaccurate to limit the number of persons who would be receiving good service from WAIT's operation at night as proposed only to the 4.4 million people and the area within the 20.6 mv/m interference-free contour. A substantial part of the population and area between that contour and the 2.5 mv/m contour line will also receive useful nighttime service.

operation of KWK in St. Louis and which existed at the time of the original nighttime grant. Under these circumstances, the 2.5 mv/m contour concept for Station WBEL has no significance for the Commission or for anyone else. It is believed that the WBEL case is typical.

(2) In the case of Albuquerque Broadcasting Company (KOB), Docket Nos. 6584-85, it was necessary to examine the nighttime interference-free contours and limitations of 482 Class II and Class III fulltime AM stations. The FCC's Broadcast Bureau entered into a stipulation on October 12, 1955 with all of the parties in that proceeding, which included Station KOB and the ABC Network, (Stipulation No. 1, Appendix C, pages 1-13), to the effect that only 67 of the 482 stations examined suffered no interference within their "normally protected contours." A copy of Appendix C to that stipulation is attached to this Supplemental Engineering Statement as Appendix 1.

(3) In the recent or current WGN case, Docket No. 18417, File No. BALH-1039, WGN's counsel introduced an exhibit (Exhibit No. 4, Table No. VI) which showed that of 100 midwest stations in classes other than Class I only 8 were interference-free within their 2.5 mv/m nighttime contours. All of the 8 were licensed by 1948 -- five before 1928. A copy of WGN's Table VI is attached hereto as Appendix 2.

(4) I have also examined and studied the nighttime interference limitations of 21 Class III stations on 1600 kc and 18 fulltime stations on 550 kc, in both cases across the country. Only 1 of the 21 on 1600 kc and only 4 of the 18 on 550 kc were found to be interference-free within their 2.5 mv/m contours. All of these 5 were licensed by 1947, 4 of them by 1925.

(5) It is evident that substantially all existing stations which suffer no interference within their normally protected contours were licensed prior to World War II. My overall impression from an engineering standpoint is that today the "normally protected contour" concept has virtually lost all significance. It has become an imaginary, purely theoretical concept, which fails to apply to roughly 90% of the currently licensed stations. In the case of these 90% of all stations now existing, the Rules simply provide in Section 73.182(d) that their actual contours "shall be the established standard for such station with respect to interference from all other stations" on the same channel.

(6) Further, the 2.5 mv/m normally protected contour concept is treated in the Commission's rules not as a requirement but merely as a recommendation for some Class II stations. See Section 73.182(a)(2). Even as a recommendation it is not applicable at all to Class II-A's. As to them, the rule provides that such



stations "are normally protected ... nighttime to the limits imposed by the co-channel Class I-A station." Likewise, Class IV stations are given daytime but not nighttime protected contours. See Section 73.182(a)(4). The problem here, if any, could therefore readily be solved simply by classification or reclassification of WAIT's proposed new nighttime service to allow the 20.6 mv/m interference-free contour to become standard for this station, by waiver or other means.

(7) There is an incongruity in the application of the 2.5 mv/m normally protected contour concept to this case. Suppose WAIT's nighttime power were to be increased from 10,000 watts to whatever might be necessary to overcome all interference from the WFAA/WBAP skywave within the 2.5 mv/m contour as now mapped (Joint Appendix, p. 69). This would extend the 20.6 interference-free contour line as now mapped (Joint Appendix, p. 68) so that it would become congruent with what is now mapped as the 2.5 mv/m contour line. All the people and area within the 2.5 mv/m contour but now outside the interference-free contour would then be covered by the new 20.6 mv/m contour. The result oddly is that the total signal radiation pattern would be enlarged and the 2.5 mv/m contour simply pushed farther out, with a gap still existing between the 20.6 mv/m interference-free and the 2.5 mv/m contours. Even though the people

and area previously of concern would have been brought inside the interference-free contour, a new group of people and a new area not theretofore of any concern to anyone suddenly become of new concern because they now become the persons and area not covered by the interference-free contour but within the new 2.5 mv/m contour. Thus an identical problem to the one which existed before is re-created as an engineering paradox. This makes it impossible to satisfy the "normal protection" concept even though 100% of the area and population required to be served by the "concept" were actually served.

One further observation. If it were important that WAIT operate interference-free up to its full 2.5 mv/m contour, this too could readily be accomplished. All the Commission need do, in addition to granting the waiver requested to WAIT, is to require WFAA/WBAP also to directionalize to protect such a contour of WAIT in Chicago from interference from Dallas-Fort Worth. Among other things, such directionalization would improve the quality of WFAA/WBAP's signal to the white areas of the northwest by concentrating its signal to the desired areas.

V. CONGESTION AND DETERIORATION OF  
NIGHTTIME AM SERVICES.

I have also been asked to report on whether the proposed operation of WAIT at night would add to the congestion of nighttime broadcasting and to the deterioration of the quality of nighttime signals on the AM band.

It is true that some frequencies have many stations occupying them. For example, the Class IV's may have as many as 150 stations on the same frequency (e.g., 1490 kc - 158 stations) and the Class III's as many as 30 or more on the same frequency at night. Whatever may be said about the kind of problem this use of the frequencies may present, such considerations can have no conceivable relevance to WAIT's proposed operation on 820 kc. 820 kc and both of its adjoining frequencies are clear channels where by definition there is no problem of congestion.

## VI. SUPER-POWER.

I have been asked to comment briefly about the problems which would arise from an engineering viewpoint if super-power were to be introduced to the AM broadcast band in the future.

Super-power is the term given to the numerous proposals to increase the maximum permitted power above the present 50,000 watt ceiling for Class I stations to 500,000 or 750,000 watts. The history of these plans and the Commission's reactions over the past 40 years since the beginning of the experimental operation of WLW, Cincinnati, is both too ponderous and too well known to merit repetition in this engineering statement.

WLW's experimental 500,000 watt high-power authorization was not licensed and was never commercially used. It now operates with 50,000 watts. Since 1946 the Commission has licensed more than 3,000 new AM broadcast stations, many of which are co-channel with the Class I-A's daytime. The new Class II-A's are co-channel fulltime, and many more stations are on the three adjacent channels on both sides of the Class I's.

The new Class II and Class II-A stations are on the Class I channels and are involved with daytime groundwave interference protection requirements of the Rules and skywave interference

requirements nighttime. Those which are on either Class I or Class III channels within 30 kc (three adjacent channels on either side) of the Class I's involve day and night groundwave protection requirements.

It is self-evident to any student of the allocation of existing stations that increasing Class I-A station power to 500,000 or 750,000 watts would create destructive interference to existing daytime services of stations on and adjacent to the I-A channels, and to the nighttime services of the co-channel fulltime stations. I believe that the authorization of super-power is impossible without the creation of unacceptable (in the private and public interest) destructive interference to existing services.

I have been involved with the allocation engineering of WRMS, 790 kc, daytime, Beardstown, Illinois, adjacent to WBBM, Chicago, 780 kc, Class I, and WVIC, 730 kc, daytime, East Lansing, Michigan, adjacent to WGN, Chicago, 720 kc, Class I. In both cases there were very narrow clearances between the respective 0.5 mv/m groundwave contours of the pairs of stations. Any increase at all of the radiation of either the Class II's toward the adjacent Class I's or vice versa would cause prohibited overlap of those contours and the result would be objectionable interference to both classes of station. Super-power, 750,000 watts

would virtually wipe out the services of these two adjacent channel stations. These two examples are, I believe, typical of a multitude of problems which exist.

Another interesting aspect of the type of problem which would arise is this: KMOX, St. Louis, 1120 kc, and WBBM, Chicago, 780 kc, are owned and operated by CBS. At 750,000 watts, they would experience an overlap of their 1.0 mv/m groundwave contours day and night and CBS would thus find itself in violation of the FCC's multiple ownership rule, Section 73.35.

Whatever the merits may be of super-power, the practical difficulty of introducing it to the AM band at this stage of development because of the devastating effects it would create upon existing stations seems to me to be formidable, indeed insurmountable. The time, if ever, for the introduction of super-power was when the FCC first authorized WLW's experimental super-power operation.

[Affidavit, Appendix 1 and Appendix 2 Omitted in Printing]



January 14, 1970

Mr. Fred Harm  
W A I T  
679 North Michigan Avenue  
Chicago, Ill. 60611

Dear Fred:

According to the Circulation PULSE 1968 County by County report, we find no measurable listening to the 820kc -- W F A A-Dallas and W B A P-Ft. Worth in the following Counties:

<u>PENNSYLVANIA:</u>	Warren	McKean	Potter	Tioga		
	Bradford	Susquehanna	Forest	Elk		
	Cameron	Clinton	Lycoming	Sullivan		
	Union	Montour	Columbia	Northumberland		
	Huntingdon	Mifflin	Perry	Franklin		
	Cumberland	Fulton	Adams	Greene		
				Juniata		
<u>SOUTH DAKOTA:</u>	Hughes	Sully	Stanley	Potter	Ziebach	Haakon
<u>WYOMING:</u>	Big Horn	Washaki	Johnson	Sheridan		
<u>MONTANA:</u>	Powder River	Rose Bud	Big Horn	Yellowstone		

The weekly circulation estimate on a household basis is employed for the determination of reporting the station's audience estimates.

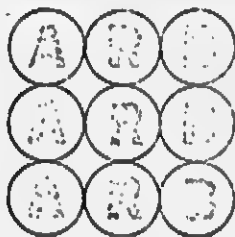
The station must be listened to by 5% of the homes in the county in the course of a week in order to have its audience measurements published for the county. Due to rounding to hundreds, it is possible for the weekly circulation, homes reached, percentage based upon projections to be less than 5%; in these cases the published percentage is based upon the original data rather than the projected data.

Cordially,

Laurence Roslow,  
Associate Director

LR/c





# AMERICAN RESEARCH BUREAU

592 Fifth Avenue, New York, N. Y. 10036 • 212, 586-7733

Vice President / Marketing  
Radio and Television Stations

RECEIVED

January 15, 1970

1970

F. C. C.  
OFFICE OF THE SECRETARY

Mr. Fred Harm  
Radio Station WAIT  
679 North Michigan Avenue  
Chicago, Illinois 60611

Dear Fred:

The following information was taken from the April/May 1969 ARB TALO report. The TALO report is the basis for projected radio audiences. The report lists the number of diary mentions for each station within the counties surveyed.

The four Pennsylvania markets surveyed by ARB are as follows and include counties measured of interest to you.

<u>PITTSBURGH</u>	<u>PHILADELPHIA</u>	<u>WILKES-BARRE/ SCRANTON</u>	<u>HARRISBURG</u>
Warren/Forest	Cumberland	Susquehanna/	Perry
Elk/Wetzel		Columbia	Cumberland
Greene		Sullivan	Adams
			Juanita

You will note that in some cases two or more counties are combined into one sampling unit. There were no diary mentions to the 820 kc for either WBAP, Ft. Worth, or WFAA, Dallas, in the above listed counties.

ARB has not surveyed South Dakota, Wyoming or Montana and consequently audience data are not available for these states.

Cordially,

Robert L. Owens

RLO/jt

ENGINEERING STATEMENT OF A. EARL CULLUM, JR., AND ASSOCIATES,  
CONSULTING ENGINEERS, ON BEHALF OF CARTER PUBLICATIONS, INCORPORATED,  
AND A. H. BELO CORPORATION

BROADCAST FACILITIES  
DIVISION

\*

\*

\*

Mar 3 1970

MAR 10 1970 I, A. Earl Cullum, Jr., am Managing Partner of the firm of consulting engineers bearing my name with offices in Dallas, Texas. I graduated from the Massachusetts Institute of Technology in 1931 with a Bachelor of Science Degree in Communication Engineering. I have maintained offices as a consulting engineer since 1936, except for the years of World War II, when I was Associate Director of the Radio Research Laboratory at Harvard University. I am a Fellow of the Institute of Electrical and Electronic Engineers and have appeared numerous times as an expert witness before the Federal Communications Commission on communication matters.

This engineering statement has been prepared on behalf of Carter Publications, Incorporated, licensee of Radio Station WBAP, Fort Worth, Texas, and A. H. Belo Corporation, licensee of Radio Station WFAA, Dallas, Texas. Radio Stations WBAP and WFAA share time and operate as Class I-A stations on 820 kilohertz with 50 kilowatts of power and a non-directional antenna located in the Fort Worth-Dallas area.

Radio Station WAIT proposes to operate on 820 kHz with 10 kW of power and a nighttime directional pattern dated December, 1966. This statement is concerned with the following aspects of the WAIT supplemental engineering statement dated January 29, 1970: (1) co-channel interference studies, (2) adjacent-channel interference studies, and (3) higher power for WBAP/WFAA. In addition, this statement is concerned with the contention that the WAIT proposal is unique in that if the WAIT proposal should be granted, there would be no other un-duplicated Clear Channel frequency that could be duplicated in a manner similar to that proposed by WAIT.

CO-CHANNEL INTERFERENCE STUDIES  
WAIT INTERFERENCE TO WBAP/WFAA 820-KHZ FACILITY

The WAIT engineering statement claims incorrectly that WBAP/WFAA are not entitled to protection beyond the 0.5-mV/m, 50% time skywave contour and quotes Section 73.182(a)(1)(i) of the Rules to support the statement.

Radio Stations WBAP and WFAA share time on 820 kHz with 50 kW of power as Class I-A facilities. Certain Class I-A stations are duplicated at night to the extent provided in Section 73.22 of the Rules. Such Class I-A stations are protected at night to the 0.5-mV/m, 50% time skywave contour. See Section 73.182(a)(1)(i). However, the frequency 820 kHz is not duplicated at night, hence the WBAP/WFAA facilities are free of co-channel interference at night beyond the 0.5-mV/m, 50% time skywave contour, not only from "objectionable interference" as defined by the usual ratio of 20/1 for desired 50% time signal to undesired 10% time signal, but from any interference from co-channel stations for any percent of the time. See Section 73.182(v), footnote 7.

The Commission's Rules provide that service extends to the 0.1-mV/m contour in all areas during winter and northern areas during summer. See Section 73.182(f). However, the Commission has consistently held that the coverage of a Class I-A station extends to wherever the signal can be heard. I have personally listened on many occasions to the 820 kHz facility on both the east coast and the west coast of the United States beyond the 0.1-mV/m, 50% time skywave contour.

The proposed nighttime operation of WAIT would cause interference to the WBAP/WFAA secondary service area over a vast portion of the northern part of the United States and Canada. The WAIT proposed operation would also cause interference within the WBAP/WFAA 0.5-mV/m contour beyond the crescent area shown in the WAIT proposal.

Studies have been made to determine the extent of the interference to the WBAP/WFAA 50% time skywave contours from the 10%, 5%, 2%, and 1% time skywave contours of the proposed WAIT operation on the basis of a ratio of 20/1 for desired to undesired signals. The following attached figures show the extent of the interference:

- 1A. Map showing interference within the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 10% of the time
- 1B. Map showing interference within the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 5% of the time

- 1C. Map showing interference within the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 2% of the time
- 1D. Map showing interference within the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 1% of the time
- 2A. Map showing interference beyond the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 10% of the time
- 2B. Map showing interference beyond the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 5% of the time
- 2C. Map showing interference beyond the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 2% of the time
- 2D. Map showing interference beyond the WBAP/WFAA 0.5-mV/m, 50% time contour from WAIT for 1% of the time
- 3. Tabulation showing the U. S. land area in square miles within the WBAP/WFAA secondary service area that would receive interference from the proposed WAIT nighttime operation.

The projections of the skywave contours of WBAP/WFAA and WAIT were carried out by using Figures 1a and 6a of Section 73.190 of the Rules of the Federal Communications Commission. Figure 1a was extended so as to include propagation curves for 5%, 2%, and 1% of the time by making use of Figure 1 of Section 73.190 of the Rules in the following manner: (1) Figure 1, which shows propagation curves for 95, 90, 70, 50, 30, 10, and 5 percent of the time, was extended to show propagation curves for 2 and 1 percent of the time by probability extrapolation of the curves on the graph, and (2) the data of Figure 1 were then converted to Figure 1a by use of Figure 6a of the Rules and  $F_o$  for a .311 wavelength antenna (the same method by which Figure 1a was constructed).

ADJACENT-CHANNEL INTERFERENCE STUDIES  
WAIT INTERFERENCE TO WCCO 830-KHZ FACILITY AND WGY 810-KHZ FACILITY

The WAIT engineering statement discusses studies made to determine if the proposed nighttime operation would cause interference to the skywave coverage of Stations WCCO and WGY at two locations, one near Mercer, Wisconsin, and the other near Gaylord, Michigan. These two locations are approximately

315 miles and 268 miles, respectively, from the proposed WAIT site. It is not surprising that the studies showed no interference was found at such locations.

WCCO operates on 830 kHz with 50 kW of power and a non-directional antenna at Minneapolis, Minnesota, as a Class I-A station. WGY operates on 810 kHz with 50 kW of power and a non-directional antenna at Schenectady, New York, as a Class I-B station.

The proposed nighttime operation of WAIT would cause interference to WCCO both within the WCCO groundwave service area north, northeast, and east of Minneapolis, and within the WCCO skywave service area around Chicago. The proposed nighttime operation of WAIT would cause interference to WGY within the skywave service area around Chicago. The following attached figures show the extent of the interference:

- 4A. Map showing interference within the WCCO 0.1-mV/m groundwave contour from the WAIT 10% time skywave contours
- 4B. Map showing interference within the WCCO 0.5-mV/m, 50% time contour from the WAIT groundwave contours
5. Map showing interference within the WGY 0.5-mV/m, 50% time contour from the WAIT groundwave contours
6. Tabulation showing the U. S. land area in square miles within the WCCO groundwave and skywave contours and within the WGY skywave contour that would receive interference from the proposed WAIT nighttime operation.

The projections of the WCCO, WGY, and WAIT skywave contours were carried out by using Figures 1a and 6a of the Rules. The projection of the WCCO groundwave contours was carried out by using the WCCO measured coverage survey extended by use of M-3 of the Rules and the equivalent-distance method for combining different conductivities, Docket No. 11227. The projection of WAIT groundwave contours was carried out by using the proposed radiation pattern and M-3 conductivity in accordance with the Rules.

Adjacent-channel interference was determined in accordance with Section 73.182(w) of the Rules as follows:

1. Ratio of desired groundwave to undesired 10% time skywave: 1/5
2. Ratio of desired 50% time skywave to undesired groundwave: 1/4

HIGHER POWER FOR WBAP/WFAA

The WAIT engineering statement asserts that the authorization of 500 kW to 750 kW of power is impossible without the creation of unacceptable destructive interference to existing stations.

The frequency 820 kHz is one of the twelve clear-channel frequencies that was reserved for the possibility of higher power in the decision in Docket 6741. If and when the Commission promulgates further rule making looking into the possibility of using higher power, the Commission will be expected to consider rule changes with respect to co-channel and adjacent-channel interference. It is also to be expected that directionalization of the antennas may be considered in certain cases to either improve coverage to "white" areas or to minimize interference to existing stations. A bilateral increase in power of all stations could be used to maintain existing service areas. It is apparent that the WAIT engineer has not considered the matter of higher power very carefully.

Station WAIT could operate on the 820 kHz channel with 5 kW of power and a non-directional antenna during daytime hours without adversely affecting the present 50 kW daytime operation of WBAP/WFAA on the 820 kHz channel, or adversely affecting the possible 750 kW daytime operation of WBAP/WFAA. The nighttime proposal for Station WAIT on the 820 kHz channel would not protect the WBAP/WFAA nighttime 0.5-mV/m, 50% time contour when operating with 50 kW of power and the nighttime proposal for Station WAIT gives no consideration to and, in fact, would not protect the WBAP/WFAA nighttime 0.5-mV/m, 50% time contour when operating with 750 kW of power. This means that the WAIT proposal would preclude normal use of 750 kW on the 820 kHz channel in the Fort Worth-Dallas area by WBAP/WFAA.



I am generally familiar with the exhibits prepared and filed with the Federal Communications Commission in the "Clear Channel Hearing" in Docket No. 6741, showing primary service and secondary service now rendered as well as primary and secondary services that would be rendered should Clear Channel Class I-A stations operate with increased power. I am familiar with the population distribution in the area served by the present WBAP/WFAA 820 kHz, 50 kW, non-directional facility and am familiar with the area that would be served by WBAP/WFAA should they operate on the 820 kHz channel with 750 kW of power and a non-directional antenna. If WBAP/WFAA should operate with the increased power, I would expect extensive service to be provided during nighttime hours to a large number of people residing within the following areas:

1. The 2.0-mV/m primary service contour from the present 50 kW operation would be extended during nighttime hours in all directions so as to provide city-grade service to many communities having a population of 2,500 or greater that do not now receive primary AM or FM radio broadcast service.
2. The 0.5-mV/m primary service contour from the present 50 kW operation would be extended during nighttime hours in all directions so as to provide rural service to extensive rural areas that do not now receive primary AM or FM radio broadcast service. There are extensive rural areas to the northeast, east and southeast and extensive rural areas to the southwest, west and northwest of the Fort Worth-Dallas area that would be served with their first primary service.
3. I am generally familiar with the population distribution in the areas in which WBAP/WFAA would provide the additional service. I am generally familiar with the radio broadcast stations assigned to those areas. Preliminary studies have been made which allow me to estimate that in excess of 450,000 would receive their first primary broadcast service during nighttime hours should WBAP/WFAA be allowed to operate with 750 kW of power on the 820 kHz channel.



4. First primary service could be provided during nighttime hours to even more people to the east and even more people to the west should WBAP/WFAA be required to use a directional antenna increasing their radiation in those directions.
5. In addition, WBAP/WFAA would provide 2.0 and 0.5-mV/m 50 percent of the time secondary service to large areas that now have only limited service.

WAIT PROPOSAL NOT UNIQUE

The WAIT proposal would protect the WBAP/WFAA primary groundwave coverage, would cause interference within the WBAP/WFAA 0.5-mV/m, 50% time contour, as shown on attached maps, and would ignore interference to the secondary service beyond that contour on the frequency 820 kHz. The proposed WAIT site is located approximately 878 miles from WBAP/WFAA. The WAIT proposal is not unique in comparison with the other frequencies among the 12 Class I-A clear channels that were held for consideration for higher power in Docket 6741. Similar situations are discussed below:

The Class I-A station on 650 kHz is WSM at Nashville, Tennessee. KIKK is a daytime station on 650 kHz located at Pasadena, Texas (a part of the Houston urbanized area). KIKK is located approximately 658 miles from WSM and could operate at night so as to protect the WSM primary groundwave service, and to cause interference within the WSM 0.5-mV/m, 50% time contour and extensive interference beyond that contour.

The Class I-A station on 660 kHz is WNBC at New York City. WESC is a daytime station on 660 kHz located at Greenville, South Carolina. WESC is located approximately 593 miles from WNBC and could operate at night so as to protect the WNBC primary groundwave service, and to cause interference within the WNBC 0.5-mV/m, 50% time contour and extensive interference beyond that contour.

The Class I-A station on 830 kHz is WCCO at Minneapolis, Minnesota. WNYC is a daytime station on 830 kHz located at New York City. WNYC is

proposing to operate at a site approximately 1015 miles from WCCO with 50 kW of power during nighttime hours so as to protect the WCCO primary groundwave service, and to cause interference within the WCCO 0.5-mV/m, 50% time contour and extensive interference beyond that contour.

The Class I-A station on 840 kHz is WHAS at Louisville, Kentucky. WRYM is a daytime station on 840 kHz located at New Britain, Connecticut. WRYM is located approximately 706 miles from WHAS and could operate at night so as to protect the WHAS primary groundwave service, and to cause interference within the WHAS 0.5-mV/m, 50% time contour and extensive interference beyond that contour.

The Class I-A station on 870 kHz is WWL at New Orleans, Louisiana. WFLO is a daytime station on 870 kHz located at Farmville, Virginia. WFLO is located approximately 843 miles from WWL and could operate at night so as to protect the WWL primary groundwave service, and to cause interference within the WWL 0.5-mV/m, 50% time contour and extensive interference beyond that contour. Another daytime station on 870 kHz is WKAR at East Lansing, Michigan. WKAR is located approximately 935 miles from WWL and could operate at night so as to protect the WWL primary groundwave service, and to cause interference within the WWL 0.5-mV/m, 50% time contour and extensive interference beyond that contour.

The Class I-A station on 1040 kHz is WHO at Des Moines, Iowa. KIXL is a daytime station on 1040 kHz located at Dallas, Texas. KIXL is located approximately 640 miles from WHO and could operate at night so as to protect the WHO primary groundwave service, and to cause interference within the WHO 0.5-mV/m, 50% time contour and extensive interference beyond that contour.

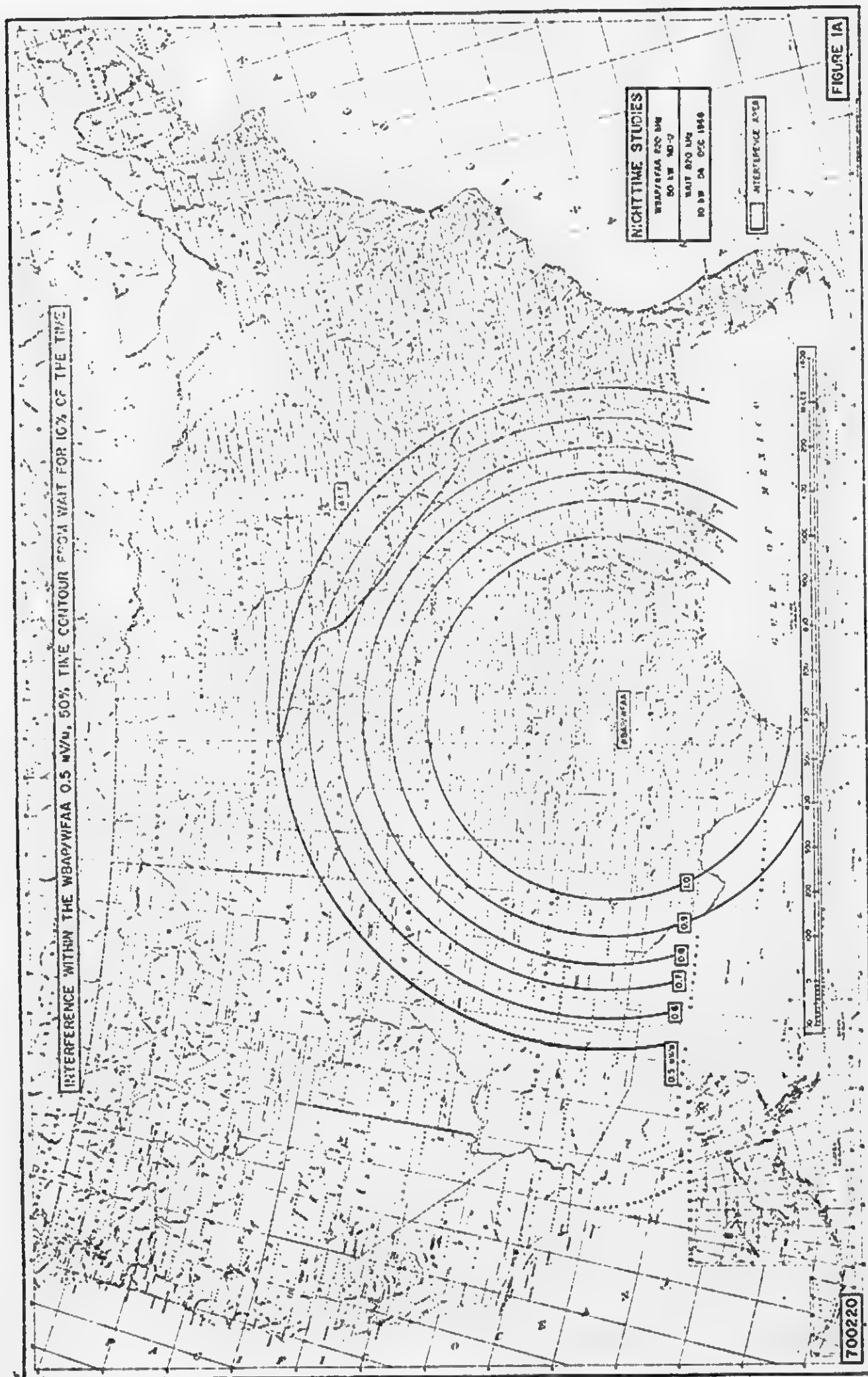
---

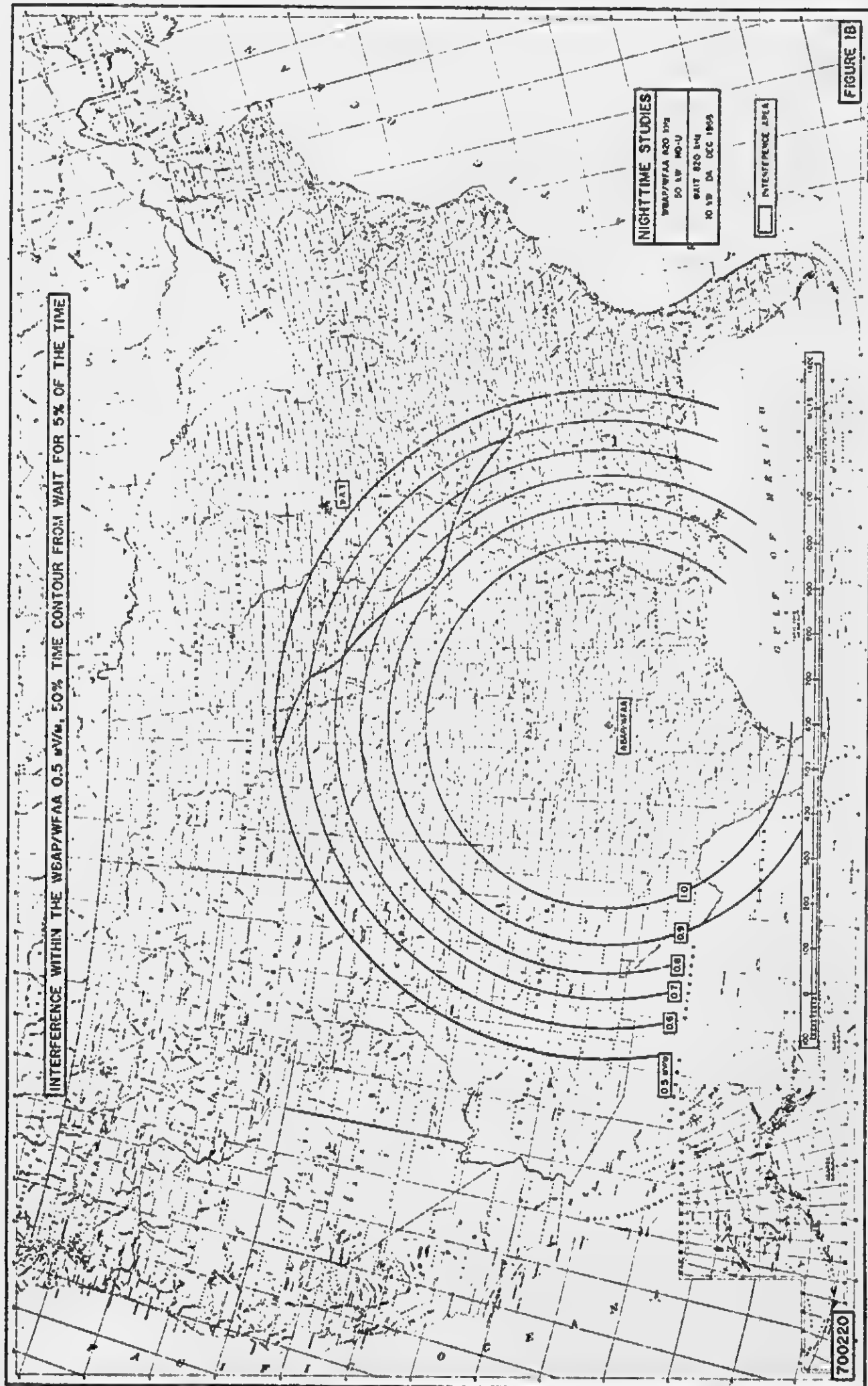
A. Earl Cullum, Jr.

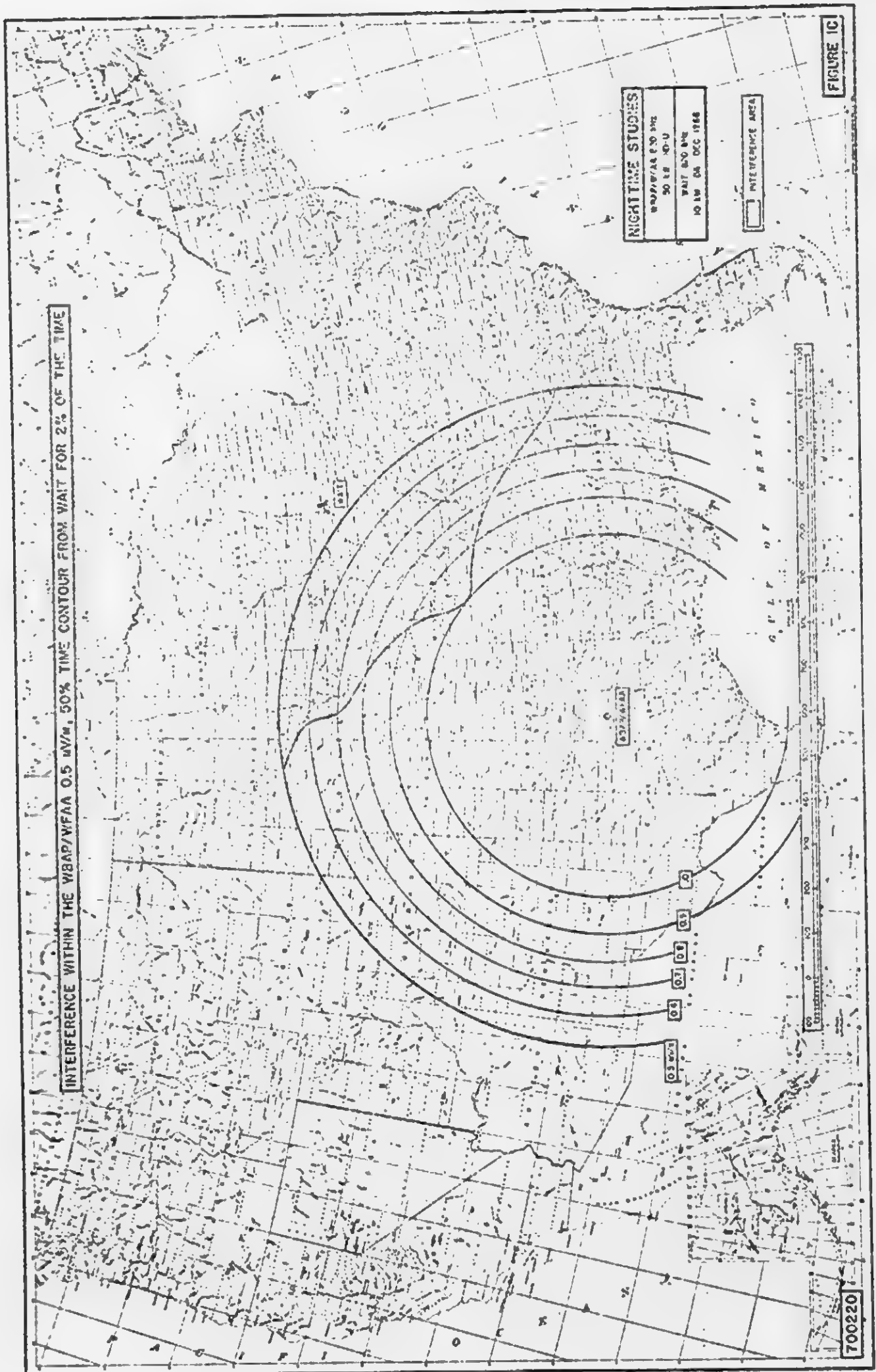
Subscribed and sworn to before me  
this 4th day of March, 1970.  
My Commission expires June 1, 1971.

---

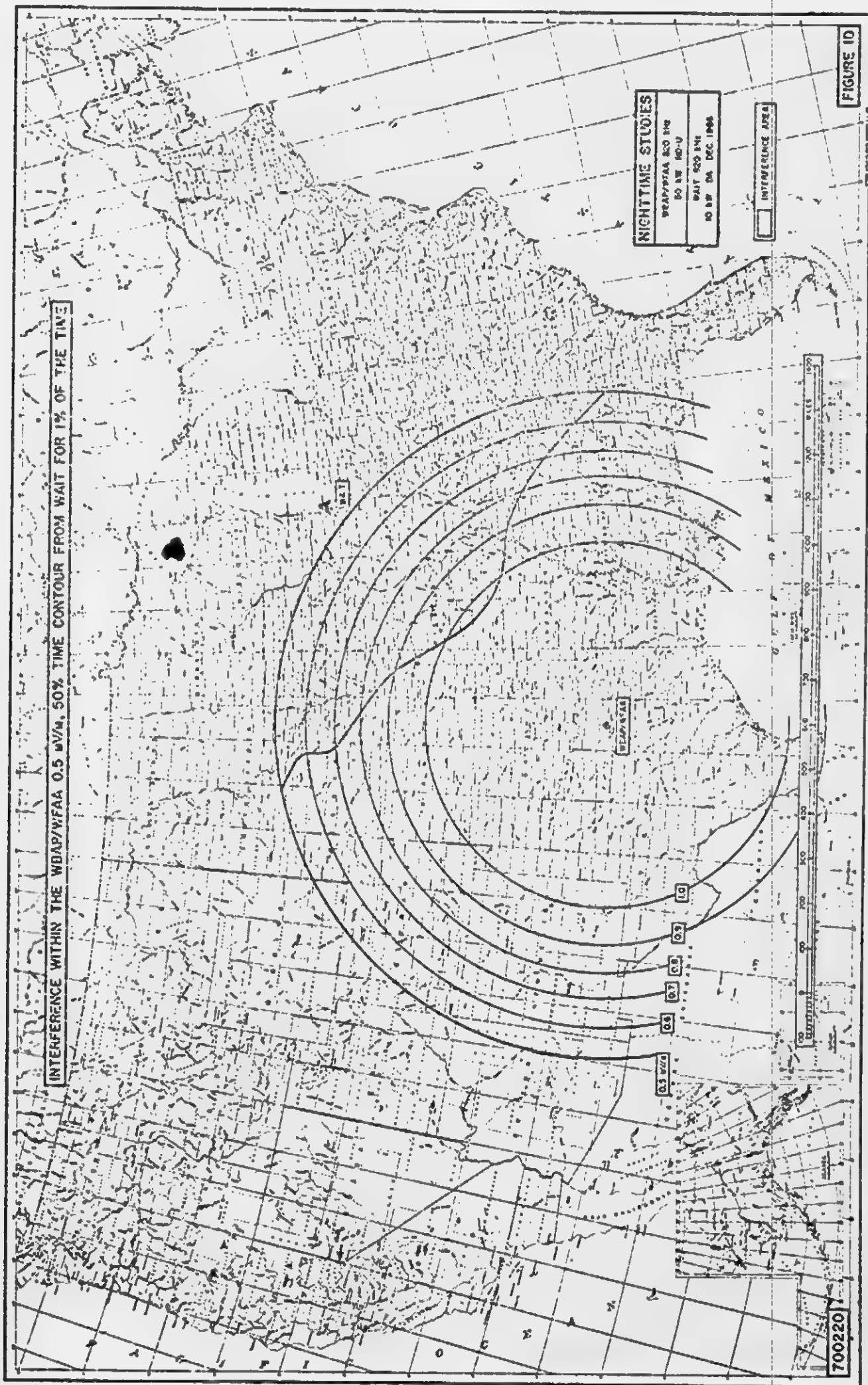
Notary Public, Dallas County, Texas





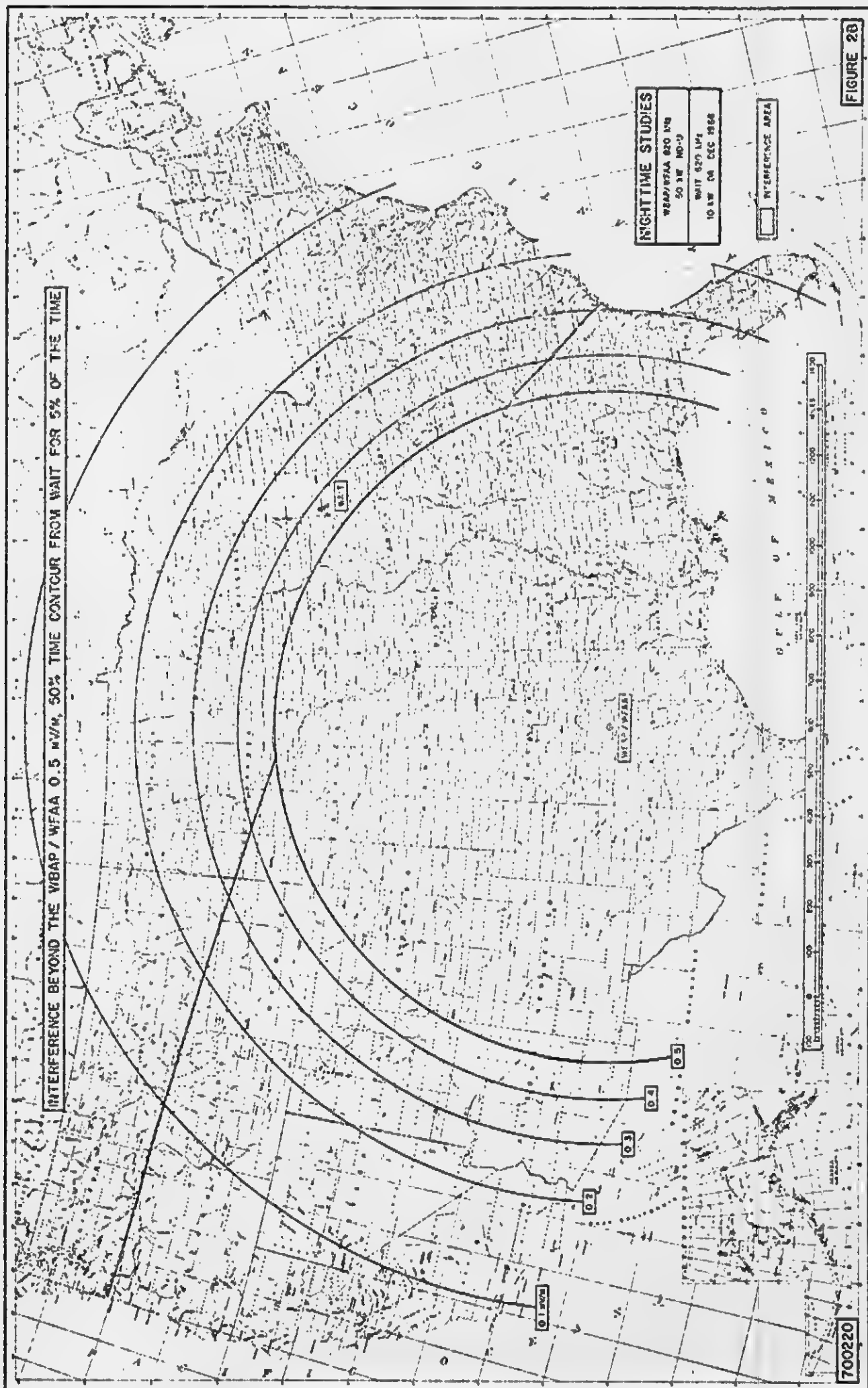


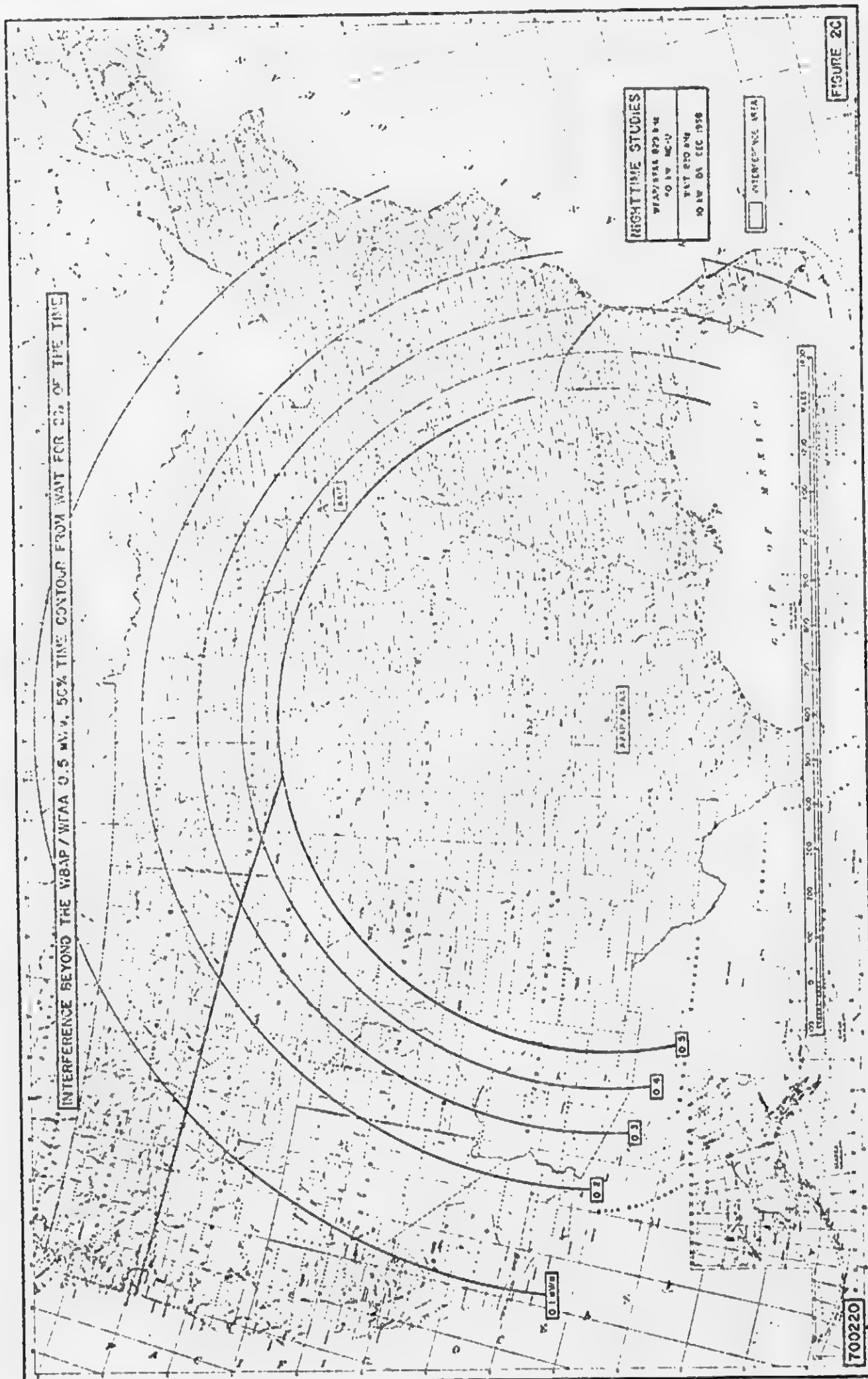












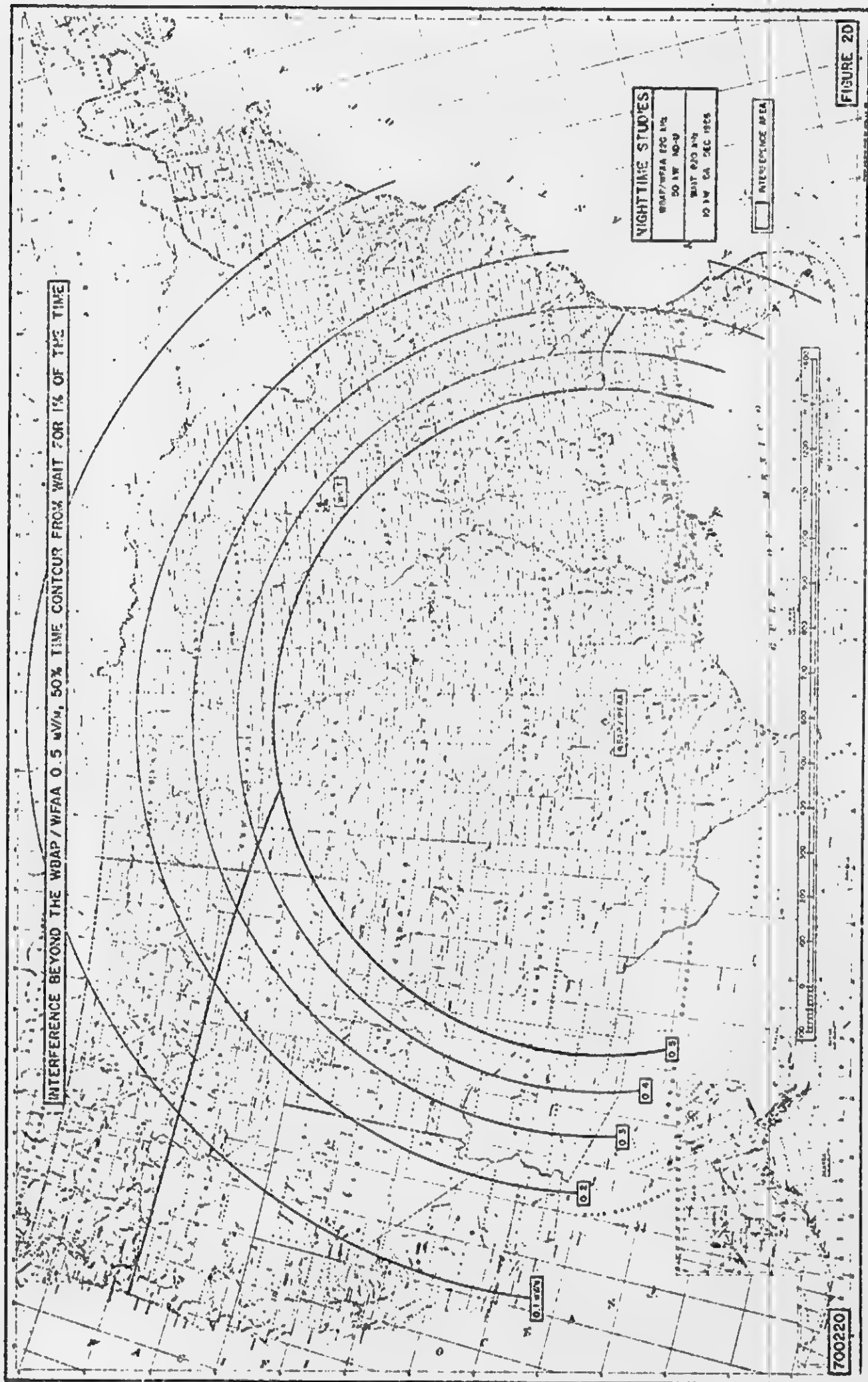


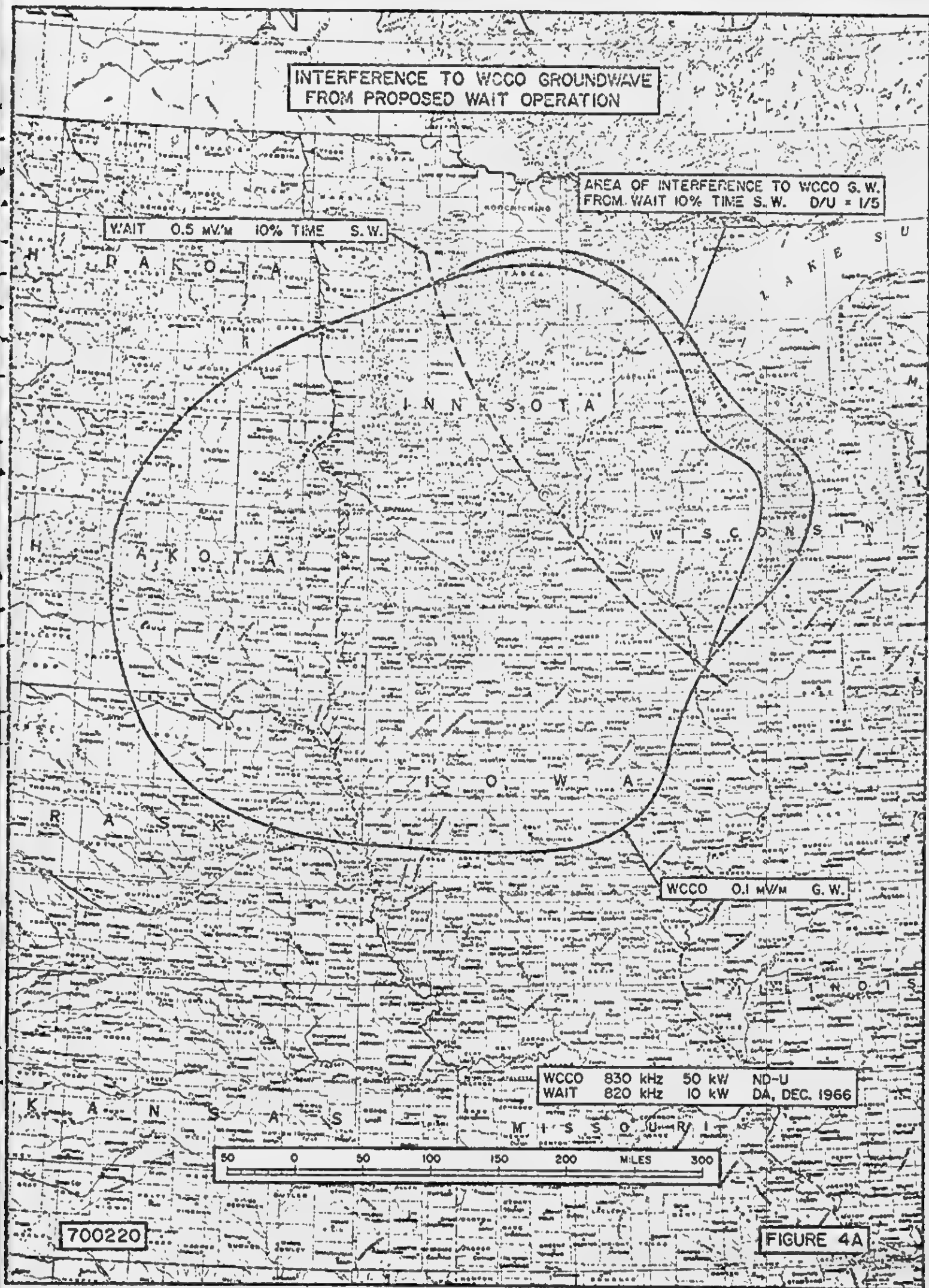
FIGURE 2D

ANALYSIS OF THE INTERFERENCE TO THE KBAP/WEAA SECONDARY SERVICE AREA  
FROM THE PROPOSED NIGHTTIME OPERATION OF WAIT - U. S. LAND AREA

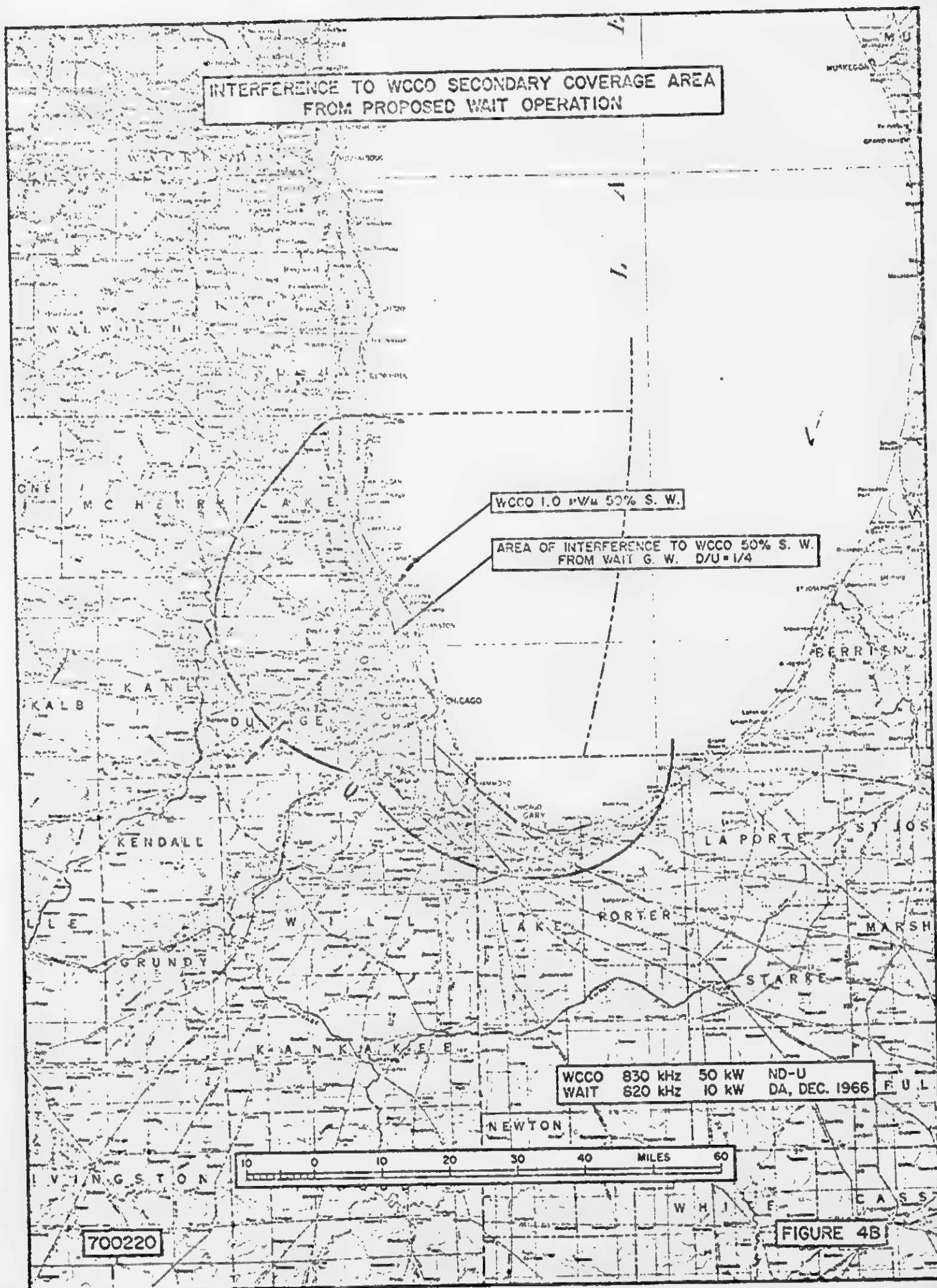
<u>INTERFERENCE</u> <u>FROM WAIT FOR</u>	<u>INTERFERENCE WITHIN</u> <u>0.5-mV/m, 50% S.W.</u>	<u>INTERFERENCE BEYOND</u> <u>0.5-mV/m, 50% S.W.</u>	<u>TOTAL INTERFERENCE</u>
10 percent of time	73,054 Sq. Mi.*	926,664 Sq. Mi.	999,718 Sq. Mi.
5 percent of time	124,809 Sq. Mi.	965,963 Sq. Mi.	1,090,772 Sq. Mi.
2 percent of time	194,812 Sq. Mi.	1,007,628 Sq. Mi.	1,202,440 Sq. Mi.
1 percent of time	248,809 Sq. Mi.	1,040,823 Sq. Mi.	1,289,632 Sq. Mi.

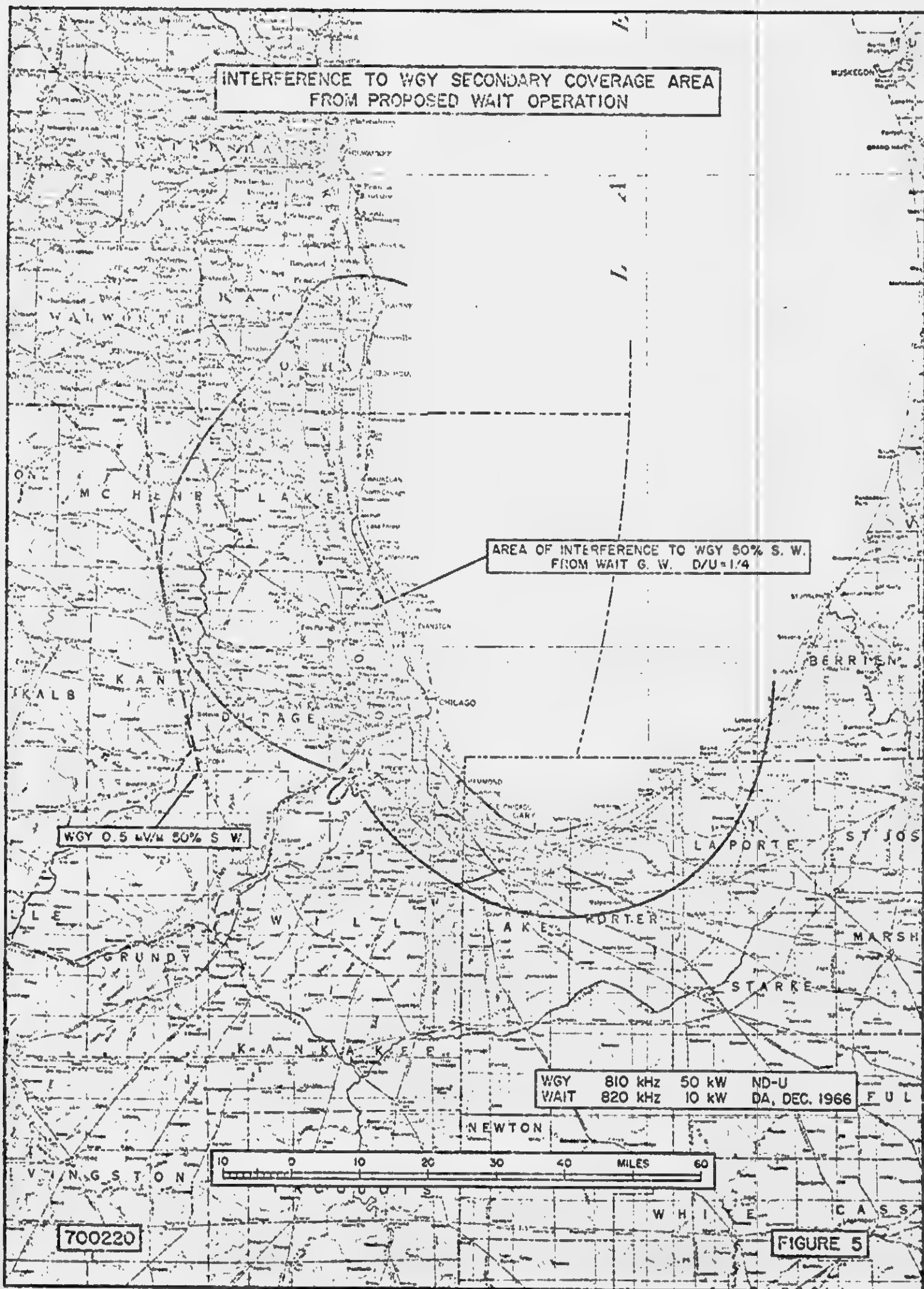
\* This figure is slightly higher than the 70,700 square miles reported by the WAIT engineer, but it is believed to be correct.

The land areas were measured by means of a polar planimeter on the original coverage maps and converted to square miles by use of the appropriate conversion factor for the map scale involved.











ANALYSIS OF THE INTERFERENCE TO WCCO AND WCY  
FROM THE PROPOSED NIGHTTIME OPERATION OF WAIT - U. S. LAND AREA

Interference to WCCO groundwave from proposed WAIT 10% time skywave	9,264 square miles
Interference to WCCO 50% time skywave from proposed WAIT groundwave	1,554 square miles
Interference to WCY 50% time skywave from proposed WAIT groundwave	2,662 square miles

The land areas were measured by means of a polar planimeter on the original coverage maps and converted to square miles by use of the appropriate conversion factor for the map scale involved.

SUPPLEMENTAL  
ENGINEERING STATEMENT FOR  
RADIO STATION W A I T  
CHICAGO, ILLINOIS  
March 23, 1970

SUPPLEMENTAL  
ENGINEERING STATEMENT FOR  
RADIO STATION WAIT  
CHICAGO, ILLINOIS  
March 23, 1970

This is the fourth supplemental engineering statement prepared for WAIT Radio, licensee of Radio Station WAIT, Chicago, Illinois. In my original engineering statement filed January 10, 1967, and the three supplements dated respectively November 24, 1967, October 23, 1969, and January 29, 1970, I endeavored to the best of my ability to present to the Commission all relevant engineering facts. I would not burden the Commission with an additional supplement at this time were it not for the necessity which has now arisen for an additional comment in order to place in proper perspective the statement dated March 4, 1970 of A. Earl Cullum, Jr. and Associates on behalf of WFAA/WBAP.

My original engineering statement and the three supplements taken together established three critical engineering propositions:

1. Through the use of a directional antenna as proposed in WAIT's application, any nighttime interference to the WFAA/WBAP skywave within its 0.5 mv/m contour would be restricted to a crescent-shaped area containing roughly 70,700 miles.

2. Within this crescent of interference, there are in fact no white areas and no grey areas.

3. Beyond the 0.5 mv/m 50% time skywave contour of WFAA/WBAP, "there is a multiplicity of other Class I skywave signals all greater than 0.5 mv/m 50% time and therefore stronger than and superior to the WFAA/WBAP signal."

The Cullum statement does not challenge the accuracy of any of these three propositions.<sup>1/</sup>

The bulk of the Cullum statement is devoted to asserting additional engineering propositions which are altogether irrelevant to the matter at hand. These irrelevant propositions all involve, as shown below, the substitution by Mr. Cullum of his own private definitions of objectionable interference for the Commission's standards:

1. As to skywave co-channel interference, instead of using only the Commission's standard of a 20 to 1 ratio 10% of the time,

---

<sup>1/</sup> On one detail, namely the exact area of the crescent of interference, there is a slight difference between Mr. Cullum's calculations of 73,054 square miles and my figure of 70,700. Neither result is necessarily more accurate than the other. No one can do these calculations twice and get precisely the same results. In any event, there appears to be absolutely no significance to the difference in the calculations.

I fail to see the engineering significance of Mr. Cullum's statement that he personally has heard the WFAA/WBAP signal on both coasts. It is a commonplace that stations of all classes are heard sporadically at remote places. A few organized listeners' clubs make a game of collecting confirmation data, known as QSL's, on long distance reception.

Mr. Cullum adds elaborate computations of 5%, 2% and 1% time interference. These calculations of interference are totally irrelevant to any aspect of this case. The only relevant definition of an objectionable interfering skywave signal is that which "exceeds for 10% or more of the time the values" proscribed. See, for example, Rules 73.182(o) and 73.182(p). Therefore, of Mr. Cullum's eight maps, six are irrelevant (1b, 1c, 1d, 2b, 2c and 2d);<sup>2/</sup> and his two remaining maps simply duplicate my prior showings.

2. In discussing adjacent channel interference from WAIT's proposed operation to WCCO's groundwave, he again utilizes his private definition of interference. He has drawn a map (4a) based on the 0.1 mv/m groundwave contour of WCCO. Once again, the Commission's rules render this map irrelevant. 73.182(v) clearly states that the groundwave of a Class I station such as WCCO is protected against adjacent channel skywaves only within the 500 uv/m.

---

<sup>2/</sup> Virtually all of the mileage figures in Table 3 are therefore equally irrelevant.

Mr. Cullum's justification for using percentages below 10% involves a flat begging of the question in this case. As long as co-existence of any other station on 820 kc is prohibited, of course WFAA/WBAP are by that fact alone protected to the uttermost, and the use of percentages below 10% is merely restating that self-evident conclusion in engineering language. But the question in this case is whether such a degree of protection exceeds the policy objective underlying the clear channel doctrine to provide service to underserved areas and whether a waiver therefore should be granted.

that is 0.5 mv/m, groundwave contour.

3. Further, in discussing adjacent channel interference groundwave to skywave, Mr. Cullum continues to follow rules of his own invention. He emphasizes in his statement and shows in his maps 4b and 5 interference from WAIT's proposed nighttime operation to the skywaves of WCCO and WGY, both on adjacent channels. The irrelevance of these showings is clear. The Commission's rules specifically provide that "the secondary service area of a Class I station is not protected from adjacent channel interference." See Rule 73.182(w).

4. The irrelevance of maps 4b and 5 requires an additional comment. The area of skywave interference mapped is primarily the Chicago Metropolitan area. Under the rules (73.182(i) and 73.182(g)), a skywave signal does not render any service to urbanized areas unless its intensity exceeds 2.0 mv/m 50% time. His maps show that WGY has a skywave signal intensity in the Chicago area of less than 1.0 mv/m 50% time, and WCCO's is less than 2.0 mv/m 50% time.

A major error in perspective pervades Mr. Cullum's discussion of interference. He has overlooked that WAIT has made a request for waiver on the ground that its co-existence at night will not conflict with any policy underlying the rules of the Commission.

His discussion of interference is divorced from any practical considerations or underlying policies. He thus solemnly points out the interference to the service rendered by the skywave of WGY in Schenectady to Chicago, and again in all seriousness the interference to the WFAA/WBAP skywave service to Canada. (See his maps 2a, b, c and d.)

In one additional respect I find data offered by Mr. Cullum to be irrelevant. He devoted pages 7 and 8 of his statement to enumeration of other stations on clear channels which might make proposals comparable to that of WAIT. While it would not appear to matter to WAIT's position that other stations may make the same claim, Mr. Cullum's citation of stations in comparable positions leaves out the main point. The distinctive contention of WAIT is that it would not cause interference to the dominant clear channel station within the latter's 0.5 mv/m contour in any white or grey area. There is no indication in his citation of the six stations as comparable that this crucial condition would be met.

In my engineering statement of January 29, 1970, I pointed out that double directionalization of both WAIT and WFAA/WBAP would improve WAIT's service to Chicago and improve WFAA/WBAP's service to the white areas of the northwest. I was pleased to



note that Mr. Cullum recognizes in his statement the value of this type of directionalization in maximizing the use of frequencies should super-power ever be authorized. There is of course no reason for limiting the potentialities of double-directionalization by tying it only to super-power.

[Affadavit Omitted in Printing]

## Excerpts from Oral Argument Before the Commission (2/9/70)

\* \* \*

37 THE CHAIRMAN: Thank you, Mr. Clark.

Any questions?

COMMISSIONER WELLS: What is the quality music? What types?

MR. CLARK: The owner is here if he would like to describe it. It is the only quality music according to the record on an AM.

MR. MAURICE ROSENFELD (Managing partner of WAIT). We play what is generally considered to be the higher case level type of music in the Chicago area.

COMMISSIONER WELLS: Such as?

38 MR. MAURICE ROSENFELD: Principally semi-classics, Broadway show music; not fully classical, but just below that.

COMMISSIONER WELLS: Thank you.

THE CHAIRMAN: Anything further?

Thank you very much, gentlemen.

(Whereupon, at 10:30 o'clock a.m., oral argument in the above-entitled matter was concluded.)

---

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 70-486  
46582

In re Application of

Maurice Rosenfield, Lois F. Rosenfield,  
Harold A. Weiss, Robert G. Weiss, and Devoe,  
Shadur, Plotkin, Krupp & Miller, a co-partnership,  
d/b as WAIT RADIO 1/  
Chicago, Illinois

Has: 820kc, 5kw, L-SS, Dallas, Texas  
Requests: 820kc, 10kw, 5kw-LS, DA-N, U

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 1970 ; Released: May 11, 1970

By the Commission: Commissioners Burch, Chairman; and Johnson concurring  
in the result.  
Commissioner Robert E. Lee absent.

1. The Commission has before it for consideration the above application which the applicant (WAIT) tendered for filing on March 7, 1967, with a request for waiver and petition for oral presentation, and pleadings in opposition and response. On October 25, 1967, this Commission by Memorandum Opinion and Order denied the petition for waiver of certain technical rules and returned as unacceptable for filing the standard broadcast application for nighttime operation submitted by WAIT Radio. On January 24, 1968, the Commission denied the applicant's petition for reconsideration. The applicant appealed to the United States Court of Appeals for the District of Columbia. On June 24, 1969, that Court remanded the case to the Commission for further consideration. 2/ The Court did not rule on the substantive contentions of the parties, but rather, directed the Commission to give the merits of the proposal a "hard look" and "...state its basis for decision with greater care and clarity than was manifested on its disposition of WAIT's claims...." 3/ In line with that decision, this Commission invited any new evidence the parties might wish to submit, and on February 9, 1970, WAIT Radio and the intervenors were afforded the opportunity to argue orally before the Commission en banc. After fully

1/ On January 6, 1970, a modification of license was granted covering a change in name of the licensee from Maurice Rosenfield, Lois F. Rosenfield, Harold A. Weiss, Robert G. Weiss, and Devoe, Shadur, Mikva & Plotkin, a co-partnership, d/b as WAIT Radio, Chicago, Ill.

2/ See WAIT Radio v. FCC, \_\_\_ U.S. App. D.C. \_\_\_, 16 RR 2d 2107 (1969).

3/ Id. at 2111, 2113.

reconsidering the submitted briefs and documents 4/ and hearing oral argument, we have reached the same result as we did in our original Memorandum Opinion and Order. We find no compelling reasons to grant a waiver of our rules 5/ and we have attempted to articulate carefully the reasons for our decision.

2. WAIT Radio is the licensee of standard broadcast (AM) station WAIT, Chicago, Illinois, and operates daytime only on 820kc with 5000 watts of power. On March 7, 1967, WAIT tendered an application with the Commission requesting permission to operate on 820kc at night with a power of 10,000 watts using a directional antenna system. 820kc, however, is a Class I-A clear channel frequency and only one station, under Section 73.25, is authorized to operate on this channel at night in North America. This nighttime operation was conducted on a share-time basis by stations WBAP and WFAA, Fort Worth/Dallas, Texas. 6/

3. In addition to requesting a waiver of Section 73.25, the applicant requests a waiver of Sections 73.21 and 73.182 which establish technical specifications for operation on the clear channel. WAIT also contends that Section 73.24(b)(3), which precludes the acceptance of an application for nighttime facilities if objectionable interference would result to an existing station, or if the proposed operation would fail to provide service to at least 25 percent of an area or population which is without nighttime primary standard broadcast service 7/, does not apply to its proposal.

4. WAIT Radio contends that a denial of its proposal would result in the "waste of a scarce communication resource" and would thereby violate the Communications Act; and that a total silencing of a station, instead of a partial silencing, to avoid station interference, results in the kind of "overbreadth" regulation which is barred by the First Amendment. In support of these claims and in its request for waiver, WAIT alleges: i) that with its proposed new directionalization facilities, co-existence on the 820kc channel is completely feasible and causes no interference to any "unserved" area within the 0.5 mv/m-50% skywave contour of the dominant Class I-A Texas stations 7a/; ii) that WAIT's "quality" programming is needed at night

---

4/ In addition to considering the original documents submitted by the parties, the Commission also received and carefully reviewed supplementary engineering statements from WAIT Radio on January 29, 1970, and April 1, 1970, and on behalf of WBAP/WFAA on March 9, 1970.

5/ The Commission has been given broad discretion in determining whether its rules should be waived. Buckley-Jacocar Broadcasting Corp. v. F.C.C., \_\_\_ U.S. App. D.C. \_\_\_, 397 F. 2d 651 (1968).

6/ A. H. Belco Corporation (WFAA) (BML-2312) and Carter Publications, Incorporated (WBAP) (BML-2313) on March 2, 1970, and March 5, 1970, respectively, filed petitions to modify their licenses. WFAA requested authorization to broadcast fulltime on 570kc and WBAP requested authorization to broadcast fulltime on 820kc. These requests were approved by Commission action April 22, 1970.

7/ The term "unserved" area is used herein to describe an area or population which is without nighttime primary standard broadcast service.

7a/ (See page 3)

in the Chicago area; iii) that Section 73.24(b)(3)(ii) which requires new nighttime operations to serve 25 percent "unserved" area or population does not apply to WAIT's proposal for nighttime authorization on a clear channel.

5. Oppositions were filed by the Clear Channel Broadcasting Service, a trade organization, Midwest Radio-Television, Inc. (WCCO, Minneapolis), and WBAP/WFAA, Fort Worth/Dallas, Texas. The essence of these oppositions was that WAIT's proposal would cause widespread interference within the 0.5 mv/m-50% skywave contour of the Fort Worth/Dallas station and beyond it; that the object of the application, to add service to an urban center already well served at the expense of underserved areas, was contrary to Commission allocation goals and "unserved" area requirements; that WAIT's proposal would cause interference, though not recognized by Commission rules, to adjacent channel station WCCO, 830kc, in Minneapolis; and that WAIT's programming is not unique and should not be regarded as a valid basis for waiver of these rules.

6. At the outset, two important grounds of possible misunderstanding should be carefully clarified: i) the applicant in this case does not attack the Commission's Clear Channel Rule Making or its underlying policies. It admits, by virtue of its waiver request, that its proposal violates those rules, but claims that its proposal is unique and therefore warrants a waiver; ii) the Commission does not disagree with, and will, therefore, not contest the applicant's constitutional analysis of "overbreadth" regulation and its First Amendment implications. 8/ We strongly disagree, however, with the applicant's allegations that denying waiver in this case would constitute such an "overbreadth" of regulation.

7. Since we are not here concerned with the basic policy considerations underlying our clear channel rules 9/, it serves no purpose to trace and explain their development in detail. Basically, these rules are designed to keep certain internationally established frequencies under strict regulation at night. In our last rule making, which was concluded after 15 years of study 10/, we decided that 13 of the 25 clear channels should be duplicated at night. Two of the important requirements, inter alia, which the new station

---

7a/ (Cont'd from p. 2) Throughout the above text, it has been assumed that if 820kc were authorized for nighttime duplication, a new station would protect the 0.5 mv/m-50% nighttime skywave contour of the dominant station. This was required of all Class II-A stations authorized to operate nighttime on the duplicated clear channels. It should be pointed out, however, that the present rules protect WBAP/WFAA from any interference on 820kc, regardless of whether it is within or beyond the 0.5 mv/m-50% secondary service area.

8/ In National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943), the Court held that a valid denial under the "public interest" standard of the Communications Act does not violate the First Amendment. The real issue is whether the rejection of WAIT's application was reasonable and consistent with the provisions of the Communications Act.

9/ The determinations reached in the Clear Channel proceeding have been reviewed and upheld. The Goodwill Stations, Inc. v. F.C.C., 117 U.S. App. D.C. 64, 325 F. 2d 637 (1963).

10/ See Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565 (1961), reconsideration denied, 24 RR 1595 (1962).

on the duplicated clear channel had to comply with were that it protect the dominant station from interference and that it serve 25 percent "unserved" area or population. We will return to the significance of this second requirement, infra. The applicant's basic claim is that although its nighttime proposal will cause interference to Class I-A station WBAP/WFAA in a crescent area which is populated by approximately 2,000,000 people, and within the 0.5 mv/m-50% skywave contour of the Texas stations, none of the crescent area is served by less than two nighttime aural services. 11/ Therefore, the applicant concludes, its proposal does not conflict with the Commission's clear channel policy, which is to preserve nighttime signals for service to areas without standard broadcast service. What the applicant, in effect, is saying, is that although it will not promote our policies, it will also not infringe upon them. Even assuming for a moment that the latter statement were true, failure to hinder a policy hardly constitutes sufficient reason to grant a waiver. 12/ However, the applicant's proposal would, in fact, serve to undercut the Commission's rules. If clear channels are going to be duplicated, and duplicated according to our rules on a systematic and controlled basis 13/, then most assuredly the public interest will not be served by authorizing another nighttime station in Chicago. In fact, in so doing, we would be preventing possible eradication of "unserved" area in other states. For example, the Commission has under consideration a petition for rule making to allow nighttime duplication on frequency 820kc tendered by station WDAE, Ellsworth, Maine. The Maine proposal would serve, within its 2.56 mv/m nighttime interference-free contour, 50.5 percent area and 26.6 percent population which is without nighttime primary standard broadcast service. The normally protected contour for a Class II-A

11/ The applicant's engineering studies show that all of the crescent area is served by at least two nighttime aural services--this takes into account both AM and FM services. The applicant's supplemental engineering statement shows that most of the crescent area is served by at least three or four stations.

12/ The argument is negative at best. WAIT's proposal not only fails to serve "unserved" area but a grant of its proposal would remove service from the interference area and add a service to the populated Chicago metropolitan area.

13/ As the Commission concluded in the Clear Channel case, to serve the public interest, a breakdown of the clear channels must be on a carefully controlled basis, one which gives a measure of protection to skywave service on the channel and which assures that new service will be located in presently underserved areas and not in metropolitan centers already receiving a large number of signals. See Section 73.22(a) which assigns those clear channel frequencies which have been "broken down" to such States as Utah, Wyoming, New Mexico, et al.



station is 2.5 mv/m, which means that the Maine proposal would be highly efficient. <sup>14/</sup> According to our studies, a grant of the WAIT proposal would mean that WDEB's proposed service contour would be decreased to its 6.36 mv/m contour and would thereby result in a substantial loss of service to the area and population which is without nighttime primary standard broadcast service.

8. The above example illustrates why the Commission has designated certain frequencies for controlled allocation. This would assure that when and if stations are allocated on these channels, they will be used to maximum efficiency. <sup>15/</sup> The applicant operates under the misapprehension that its "quality" programming to listeners in the Chicago area, so long as it does not interfere with an existing station's service to "unserved" area, is in the public interest, and a denial of its proposal a misapplication of licensing authority under the Communications Act and an "overbreadth" of regulation and abridgement of First Amendment rights. The argument is unpersuasive. The severe congestion which exists on other frequencies because of the liberal allocation procedures of the past have been avoided on the clear channels through strict adherence to important technical and policy considerations underlying those rules.

9. The foregoing is not intended to suggest that our rules are sacrosanct. However, the Court of Appeals, in its remand order, clearly stated:

"Presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule. An applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action." Rio Grande Family Radio Fellowship, Inc. v. FCC, \_\_\_ U.S. App. D.C. \_\_\_, 406 F. 2d 664 (1968)." <sup>16/</sup>

<sup>14/</sup> The WAIT proposal would fail to serve 30.7 percent of the population and 80.5 percent of the area within its 2.5 mv/m normally protected nighttime contour.

<sup>15/</sup> Counsel for both WBAP/WFAA and WAIT Radio have submitted opposing petitions on the merits of "super power". In our original decision of the WAIT proposal, we noted that at the present time eight proposals by Class I-A stations for temporary (developmental) operation with power in the order of 500 or 750kw have been tendered but not accepted for filing. Also tendered are several petitions for and against "super power" operation and a request that the rules be amended to permit power in excess of 50kw in the AM band. The Commission still maintains that clear channel 820kc should remain unduplicated at night until studies are concluded with regard to the feasibility of higher power. See our Memorandum Opinion and Order, Docket 6741 (FCC 62-1214, 24 RR 1595) released November 28, 1962, in par. 45 relating to the 820kc channel.

<sup>16/</sup> Supra at note 2 at 2112, \_\_\_ U.S. App. D.C. \_\_\_ (1969).



The applicant simply has not presented facts which warrant a waiver of these rules. Chicago can hardly be thought of as having a dearth of AM and FM facilities. <sup>17/</sup> A grant of this proposal would result in a severe and undesirable erosion of our clear channel rules. Since the Commission's authority in this area is well established, and its actions are pursuant to the policies and rules established after long years of study and consideration, a denial of the applicant's proposal on these grounds is in the public interest, within the ambit of the Communications Act of 1934, as amended, and not an "overbreadth" of regulation which restricts constitutional rights under the First Amendment.

10. In addition to the interference caused within WBAP/WFAA's secondary service area, a grant of WAIT's proposal would also cause interference, both beyond WBAP/WFAA's nighttime 0.5 mv/m-50% skywave contour, and well within the secondary service area of 1,500, a Class I-A station on adjacent clear channel 830kc, and WXY, a Class I-B station on adjacent channel 810kc. WAIT points out that this interference does not violate the rules and that the interference caused beyond WBAP/WFAA's nighttime skywave contour is in areas which already have a multiplicity of Class I skywave signals.

11. When an applicant requests a waiver of the rules which have been promulgated in the public interest, all factors become relevant to that interest. Almost all new allocations for AM stations will cause some interference not recognized as objectionable under our rules. This does not mean, however, that the Commission considers it desirable to permit such interference. It only means that we have sacrificed optimum broadcast standards in order to serve other aspects of the public interest. This has been evidenced in our preference for proposals which would be first local outlets or which would serve a substantial amount of area which was without nighttime primary standard broadcast service. In virtually all of these allocations, some interference, not objectionable under our rules, yet ideally undesirable, is allowed in order to serve the public interest. However, the Commission has recently refused to waive its rules to accept applications for nighttime facilities which would not serve 25 percent "unserved" area or population or provide other overriding public benefits. <sup>18/</sup> Since each new signal causes some unrecognized interference, we have adhered to this policy in order to prevent further degradation of AM service on already congested channels.

12. Although we are not now faced with congestion on the channel 820kc, an ultimate grant of the WAIT proposal would impede future allocations on the channel should we conclude that such authorizations would be in the public interest. Moreover, as indicated above, in addition to the interference caused within and beyond WBAP/WFAA's 0.5 mv/m-50% nighttime skywave

<sup>17/</sup> The general Chicago area has 25 AM and 16 FM stations.

<sup>18/</sup> e.g., Washington Broadcasting Co., Inc., 18 RR 2d 160, 20 FCC 2d 1094 (1970) (KREN, Renton, Washington); WGBA, Inc., 18 RR 2d 352, 21 FCC 2d 493 (1970) (WHYD, Columbia, Georgia). Also see 560 Broadcast Corp. v. FCC, 8 RR 2d 1134 (1966) Petition for reconsideration denied, 14 RR 2d 404 (1968), Commission affirmed, \_\_\_ U.S. App. D.C. \_\_\_, \_\_\_ F. 2d \_\_\_, 17 RR 2d 2054, (D.C. Cir.) (1969).

contour, a large area would also lose reception of WCCO and KGY signals where they are not protected from interference under our rules. This loss of service, in order to provide Chicago with another AM nighttime service in addition to the 25 already there, simply is not in the public interest. 19/

13. The applicant has also questioned the applicability of Section 73.24(b)(3). 20/ WAIT points out that near the time Section 73.24(b)(3) was adopted, the Commission unambiguously stated:

"We do not consider here the question of nighttime operation on Class I-A channels. This is an entirely separate problem involving non-engineering considerations." See Docket No. 6741. 21/

14. However unambiguous the above language may be, it is clearly not intended to preclude application of Section 73.24(b)(3) to WAIT's proposal. At the time this section was adopted, there was no reason to consider the question of nighttime operation on Class I-A channels. 22/ First, except for those channels selected for nighttime duplication, our rules prohibited new nighttime operations on the Class I-A clear channels altogether. Second, Section 73.22 required Class II-A stations, which were authorized to duplicate nighttime service on 13 of the 25 selected Class I-A channels, to serve 25 percent "unserved" area or population and protect the dominant existing station from interference at its 0.5 mv/m-50% nighttime skywave contour. Therefore, in order to avoid confusion and unnecessary repetition, Section 73.24(b)(3) was specifically made inapplicable to Class II-A stations. However, it does not follow that its requirements are not applicable to WAIT. According to Sections 73.21 and 73.22, Class II-A is the classification given to those stations assigned to the Class I-A clear channels which were specifically authorized for nighttime duplication. Since WAIT is not requesting authority to operate on one of these channels, it is not, by definition, a Class II-A station and, therefore, is not exempt from the requirements of the rule. 23/

19/ Deprivation of a recognized but unprotected signal is a valid consideration in reaching a conclusion on the question of the public interest. See Interstate Broadcasting Co., Inc. v. FCC, 25 RR 2046, 116 U.S. App. C.C. 327, 323 F. 2d 797 (D.C. Cir. 1953).

20/ For provisions of this section, see paragraph 3, supra, at page 2.

21/ See In the Matter of Amendment of Part 3 of the Commission's Rules Regarding AM Station Assignment Standards, etc., 25 RR 1615 at 1631, fn. 37 (1963).

22/ Apparently, the Court viewed the applicability of Section 73.24(b)(3) as superfluous. Footnote 2 of the opinion reads as follows: "The pertinent rules are found in 47 C.F.R., Sections 73.21, 73.25, 73.182(a)(1)(i), and 73.182(w) (1963). While Section 73.24, C.F.R. Sect. 73.24 (1968) is also involved, it would seem that in the context of this application for waiver, it adds nothing..."

23/ Even if WAIT were classified as a Class II-A proposal, it would still be required to serve 25 percent "unserved" area or population and protect the 0.5 mv/m-50% nighttime skywave contour of the dominant station under Section 73.22.

15. The applicant also argues that, in any event, Section 73.24(b)(3) could not constitutionally bar its application. The applicant alleges that the rule was intended to deal with interference problems due to severe congestion on certain frequencies and that this problem does not exist on the clear channels. With regard specifically to the "unserved" area requirement, the applicant argues that application of this part of the rule to its proposal results in the Commission's pursuing self-contradictory policies. WAIT contends that even if an applicant proposed to serve 25 percent "unserved" area, its application would be denied on the grounds that service to "unserved" area is reserved for the existing clear channel station.

16. The above arguments are without merit. It is true that the requirements of this rule were designed to control the unnecessary congestion caused by skywire to groundwave interference without at least some counter-vailing public benefit. However, our clear channel policy to regulate nighttime authorizations has been upheld, and, not coincidentally, these rules required that new stations on the duplicated channels serve 25 percent "unserved" area even though there was no immediate fear of congestion. In our 1964 Report and Order 24/, initiating the "go-no go" policy and establishing the "unserved" area requirements for new nighttime operations, we carefully noted that each new signal added on a channel tends to increase the probability of interference not recognized as objectionable under our rules. This is no less true on the clear channels. In fact, our basic policy to regulate future allocations on the Class I-A channels on a controlled basis was adopted primarily because of this incremental interference caused by new nighttime allocations. Specifically, interference in this case would be caused not only within the secondary service area of the Class I-A facility in Texas, but also far beyond; strong signals would also result in vast areas where interference would occur should we subsequently consider additional nighttime operations.

17. The applicant's argument that the Commission is pursuing self-contradictory goals is also unpersuasive. Section 73.24(b)(3) has relevance to a new proposal on a clear channel only if the Commission waives the clear channel rule which precludes new proposals at this time. To argue that they are mutually exclusive and contradictory, however, is incorrect.

18. Finally, the requirements of Section 73.24(b)(3) do not constitute an abridgement of free speech or waste of a communications resource, but rather, maintain, in the public interest, an intelligent plan of conservation. Our intention to "freeze" specific clear channels in order to preserve for future allocation those proposals which will serve the public in areas that are without primary standard broadcast service is clearly not

---

24/ See 2 RR 2d 1658 (1964).

an "overbreadth" of statutory regulation. 25/ The example of what effect a grant of WAIT's proposal would have on the efficiency of the Maine proposal, supra at page 4, should it be granted, clearly illustrates the wisdom of applying strict rules today in order to serve the public interest tomorrow. A grant of this proposal in an area that is replete with aural broadcast service is not in that interest.

19. Since only the technical aspects of the clear channel policy have been dealt with, some mention should be made of the applicant's claim of "unique" and "quality" programming and its relevance to a waiver request. First, it does not appear that the applicant's programming format is so unique that at least one or two of the AM or FM services in Chicago does not provide a reasonable facsimile. 26/ However, notwithstanding the presence or absence in Chicago of WAIT's particular programming format, programming is usually not given particular consideration in reviewing allocation requests. 27/

20. Just recently 28/ this Commission denied a nighttime proposal in Jacksonville, Florida, which violated our old 10 percent rule prohibiting a station from receiving interference to more than 10 percent of the population within the station's proposed normally protected primary service area. The applicant's request for waiver of the 10 percent rule in order to operate nighttime was based on a showing of need to allocate a second Negro-oriented operation. We found, however, that the six (6) nighttime stations in Jacksonville, including the one Negro-oriented station, were responsive to the needs and interests of the Negro community. More important, however, we found that authorization of the applicant's proposal might preclude future allocations of stations in areas with greater need for broadcast service.

---

25/ In a per curiam decision on June 30, 1967 (Case No. 20,527), the U.S. Court of Appeals for the District of Columbia affirmed a Commission denial of a proposal from KXA, Inc., Seattle, Washington, to operate with increased power daytime on nighttime clear channel 770kc. See KXA, Inc., 5 RR 2d 338 (1965), petition for reconsideration denied, 5 FCC 2d 60, 8 RR 2d 723 (1966). We noted in our opinion that further assignments for daytime only stations would tend to degrade the channel and hinder later assignment to fulltime stations.

26/ At oral argument on February 9, 1970, Mr. Maurice Rosenfield (managing partner of WAIT), responding to Commissioner Wells' question of what is quality music, said that WAIT plays "...what is generally considered to be the higher case level type of music in the Chicago area - principally semi-classics, Broadway show music; not fully classical, but just below that." Our studies show that there are no less than four (4) FM stations in Chicago and the suburban area which list semi-classical or Broadway showtunes as part of their programming format.

27/ and 28/ (See page 10).

21. Although programming is not irrelevant to consideration of a waiver request, the "...greatest weight must be given to the enduring allocation characteristics of a proposal rather than to the generally transitory programming to be carried out." 29/ WALT's programming proposal not only fails to be unique, but would cause interference, in violation of our rules, within the secondary service area of WBAP/WFAA, Fort Worth/Dallas, Texas. WALT's proposal also would cause interference beyond the 0.5 mv/m-50% nighttime skywave contour of WBAP/WFAA. Moreover, WALT's proposal, if granted, would tend to degrade the 320kc channel and thereby reduce the possibility of locating stations, at some future date, in areas that may have greater need for nighttime aural broadcast service. In fact, we have already pointed out that WALT's proposal would substantially reduce the service to "uncarved" area of a proposal to operate on 320kc in Maine. Under these circumstances, the transitory nature of programming is clearly outweighed by the adverse effects a grant of WALT's proposal would have on future allocations.

22. In view of the foregoing, we find that the applicant has failed to present sufficient reasons, if true, to justify a waiver. Under these circumstances a hearing is not necessary. United States v. Storer Broadcasting Company, 351 U.S. 192, 13 RR 2131 (1956).

23. Accordingly, IT IS ORDERED, That the request for waiver IS DENIED, the application is not acceptable for filing, and the petitions to dismiss ARE RENDERED moot.

FEDERAL COMMUNICATIONS COMMISSION

*Ben F. Waple*  
Ben F. Waple  
Secretary

27/ (Cont'd from p. 9) See Buckley-Jacobs Broadcasting Corp. v. F.C.C., \_\_\_ U.S. App. D.C. \_\_\_, 397 F. 2d 650 (1968); WREN, Inc. v. United States, 396 F. 2d 601, 622 (C.C.A. 2 1968); James S. Rivers v. F.C.C. 122 U.S. App. D.C. 29, 351 F. 2d 194 (1965), all upholding Commission actions denying waiver requests based on program considerations.

28/ (Cont'd from p. 9) Mel-Lin, Inc., 18 RR 2d 787, (1970), petition for reconsideration filed April 20, 1970. See also Semrow Broadcasting Co., 7 RR 2d 645, 652 (1966) (Commissioner Cox concurring).

29/ Mel-Lin, Inc., 18 RR 2d 787, 793 (1970).



Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20025

-----  
In The Matter Of :

RADIO STATION WAIT :

Docket No.

PETITION FOR RECONSIDERATION OF MEMORANDUM OPINION  
AND ORDER RELEASED MAY 11, 1970,  
BASED UPON APPLICANT'S OFFER TO ACCEPT  
A WAIVER CONDITIONAL UPON FREQUENCY 820 Kc.  
REMAINING A CLEAR CHANNEL

The Petitioner WAIT Radio respectfully requests reconsideration of the Commission decision released May 11, 1970, denying its request for a waiver of the clear channel rules to enable it to broadcast at night on 820 kc.

This is the second time the Commission has denied WAIT Radio's waiver request. Following the first denial, contained in an order released October 30, 1967, the Court of Appeals for the District of Columbia remanded the matter to the Commission for further consideration. WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). Since then, the Commission has declined a request for a specification of issues, but granted a motion for oral argument and allowed the parties to submit further engineering data.

The petitioner believes that in its latest opinion the Commission has for the first time stated clearly its reason for denying a waiver, and that these objections to a waiver--which are in applicant's opinion legally inadequate--can be obviated. To focus upon the issues now controlling, however, it is important to emphasize the matters no longer at issue and to set forth briefly the mandate of the Court of Appeals which must guide the disposition of the remaining issues.

WAIT Radio has requested a waiver on the ground that its nighttime operation with a directionalized antenna would not threaten any policy underlying the clear channel rules. The clear channels exist to permit powerful nighttime stations to provide a secondary or skywave service to remote areas of the country receiving no primary or ground wave service. Unchallenged engineering data show that WAIT Radio would not interfere with the protected signals of the clear-channel station now occupying the 820 kc. frequency<sup>1/</sup> in any unserved or "white" area within the 0.5 mv/m- 50% contour. Indeed, the data show that all of the people living in the area of interference now receive two or more strong ground wave signals, and 95% receive three or more. In addition to primary service, ten other clear channels provide a skywave signal at least twice the quality of WBAP's within the area of interference. Moreover, the evidence shows that no one listens to WBAP in that area.

1/ At the time WAIT Radio filed its application, Stations WBAP and WFAA in Fort Worth and Dallas, Texas, shared the 820 kc. frequency on an alternate basis. On April 22, 1970, the Commission approved an agreement between the two stations whereby WBAP became the sole occupant of 820 kc.



Since this is so, WAIT Radio has argued that the First Amendment compels a waiver of the clear channel rules. A contrary result would needlessly waste an available radio frequency --a clear "overbreadth" of regulation.

This reasoning persuaded the Court of Appeals that WAIT Radio was entitled to a "reflective consideration" of its application not evidenced by the Commission's initial decision. 418 F.2d at 1160. The Court's analysis of the need for waivers within a system of general rules is critical in determining the sort of "hard look" required and the circumstances under which a waiver is appropriate, indeed required.

The core of the court's reasoning is its analogy of a waiver to a "safety valve" that allows special treatment of special circumstances:

"The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."

Id. at 1157.

Elaborating on the need for waivers, Judge Leventhal went on to emphasize the duty of an administrative agency to deal with unique individual cases as well as general issues of policy"

"That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the

"public interest" for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases."

Id.

The Commission, in applying this analysis on remand, has recognized that WAIT Radio is not attacking the clear channel policy. It has also acknowledged that wasting an available frequency would constitute an impermissible overbreadth of regulation. But the Commission has concluded that a nighttime authorization for WAIT Radio would violate another Commission policy, and consequently that a waiver denial will not needlessly waste an available frequency.

The policy now at stake in the Commission's eyes is the need to preserve its flexibility to authorize future operations on 820 kc. In short, WAIT Radio now learns, its nighttime operation is objectionable because the Commission fears its hands would be tied when and if it decides to break down 820 kc. as an unduplicated clear channel by rule-making.

WAIT Radio believes that the objection can be met by an offer to accept a waiver of the clear channel rules conditional upon a final Commission order at any time in the future breaking down the 820 kc. frequency as a clear channel through rule-making.<sup>2/</sup> If such proceedings are instituted, WAIT Radio agrees that it shall then stand

<sup>2/</sup> WAIT Radio has already offered to accept a waiver subject to future authorizations of superpower on the 820 kc. frequency.

on an equal footing with all other applicants in the rule-making proceedings.<sup>3/</sup>

This offer to accept a conditional waiver should obviate the Commission's fears that a waiver now would deny it the future flexibility to duplicate this clear channel "on a controlled basis." WAIT Radio recognizes that the Commission may be wary of an arrangement that might expose it to the frequently encountered problems of "grandfathering" existing facilities. Cf. 418 F.2d at 1158 n.14. But this potential difficulty could be solved by clear drafting of WAIT Radio's waiver to bar any future claims based on past investments or reliance on this nighttime authorization.

A conditional waiver would also eliminate any issue concerning the requirements of Sections 73.24(b)(3) and 73.22 of the Rules for 25 per cent "white area" service. The former section would not apply, as the Commission now seems to acknowledge, because a clear channel is involved. And since the waiver would be conditional upon 820 kc. remaining a clear channel, Section 73.22 would be unapplicable. That section applies only to Class II-A stations authorized to duplicate nighttime service on clear channels which have been broken down in rule-making.

<sup>3/</sup> It bears emphasis in this context that the application of station WDAE in Ellsworth, Maine, to which the Commission adverted in its opinion, is not a conflicting waiver request but an application for the initiation of rule-making proceedings to break down 820 kc. as a clear channel.

The Commission seems to concede that granting the requested waiver would not violate any of its other policies, but complains that those policies would not be promoted. Free speech cannot be silenced merely because it fails to support a Commission policy. The basic policy set by the Congress is to maximize the number and diversity of broadcasting voices. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). This policy is violated by the denial of this application. The nation's limited airwave resources would be wasted by the needless underutilization of this frequency. No impermissible interference would result from nighttime operation. Indeed a wide margin of safety protects WBAP and stations on adjacent frequencies from such interference.<sup>4/</sup> The AM spectrum may be

<sup>4/</sup> The Commission in its latest denial of WAIT Radio's waiver request did advert to the supposed interference nighttime operation would cause "beyond WBAP/WFAA's nighttime 0.5 mv/m-50% skywave contour, and . . . within the secondary service area of WCCO . . . on adjacent clear channel 830 kc., and WGY . . . on adjacent channel 810 kc." Although it recognized that the interference would violate none of its rules, the Commission concluded that "deprivation of a recognized but unprotected signal is a valid consideration in reaching a conclusion on the question of public interest," citing Interstate Broadcasting Co. v. FCC, 323 F.2d 797 (D.C. Cir. 1963).

WAIT Radio respectfully submits that the fact that Commission protects stations against interference only up to certain defined limits should, to the contrary, be interpreted to mean just that--and that interference beyond those limits is not objectionable, and is not a "valid consideration." The Interstate Broadcasting case stands more nearly for that proposition than for the Commission's position. The Court of Appeals said there,

"The concept of a protected contour implies a legislative judgment by the Commission that

congested generally because licenses were improvidently granted in earlier years. This is no reason to deny a carefully engineered proposal for an authorization that could not possibly add to the congestion problem.

Nor does the Commission deal accurately with the issues or facts of underserved areas. First, the airwaves, like legislators, should "serve people, not trees, or acres." Cf. Reynolds v. Sims, 377 U.S. 533 (1964). America is an urban society. The Commission refers at least four times in its opinion to "metropolitan centers, already receiving a large

4/ (Con't)

new services which destroy an existing service beyond that contour are normally more in the public interest than the service they destroy. In effect the Commission's rules embody this judgment. It is a reasonable one and within the Commission's discretion.

Id. 801.

The court went on to conclude that allegations of special injury by a station whose signal would be destroyed beyond its protected contour might justify, in effect, a waiver of the normal rule that protection could be claimed only up to the specified contour, and remanded the case before it for further findings of fact, since the appellant had "contended throughout the proceedings . . . that special circumstances did justify protecting its primary service area beyond the 0.5 mv/m contour." Id. at 801-02.

Here there have been no such claims, let alone showings, of special circumstances by WBAP or WCCO (WGY has not appeared as a party). Neither station has attempted to show that anyone listens to its signal within the nonprotected areas the Commission would nevertheless protect--and this despite the fact that WAIT Radio has shown that in fact no one listens to station WBAP in the areas in question.

number of signals," "replete with broadcast service," "hardly a dearth of AM and FM facilities." There cannot be too many voices in America so long as they do not interfere with each other. We must not ration free speech. Furthermore, the Commission's reference to 25 AM and 16 FM stations in Chicago is in error. There are in fact only 13 AM and 13 FM stations in Chicago, Standard Rate & Data, pp. 295-302 (May 1, 1970). Only seven of the AM stations operate full time, and, at most, only one of these is both independent and locally owned.

The Commission's efforts to provide more radio service to remote parts of the nation, moreover, has shown at best poor results. In 1938 there were 503 AM stations providing primary service to 39.7% of the United States. By 1962, despite the addition of more than 1500 additional AM stations, the area of the 48 contiguous states provided primary service had grown only imperceptibly, to 42%. The reason is clear; the remaining 58% of the land cannot support radio stations. But, finally and most importantly, the relative need for more radio stations in metropolitan versus rural areas is simply irrelevant to a waiver proceeding such as this where the petitioner would in no way threaten the policy of extending radio service to remote areas, whatever the viability of that policy.

The basic thrust of the Commission's decision is its insistence upon "an intelligent plan of conservation . . . in

order to preserve [clear channels] for future allocations."

WAIT Radio does not quarrel with the importance of retaining flexibility for "future allocations." It respectfully submits, however, that a rigid policy of "conservation" until such future allocations are made is both unnecessary and inappropriate. "Conservation" is unnecessary because the same flexibility can be retained through the use of conditional waivers. And it is inappropriate because the limited radio frequencies available for AM broadcasting are not acorns to be stored underground, but a precious resource which should be utilized to the fullest. They are not, it must be remembered, exhausted by use, but merely wasted by non-use.

Respectfully submitted,

Dated: June 10, 1970  
Washington, D.C.

RADIO STATION WAIT,  
a copartnership,  
Applicant

By:

Ramsey Clark  
Paul, Weiss, Goldberg, Rifkind,  
Wharton & Garrison  
1775 K Street, N. W.  
Washington, D. C. 20006

HARRY KALVEN  
University of Chicago Law School  
Chicago, Illinois 60637



Before the

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

In re Application of )

Maurice Rosenfield, Lois F. Rosenfield, )  
Harold A. Weiss, Robert G. Weiss, and )  
Devoc, Shadur, Plotkin, Krupp & Miller, )  
a co-partnership, d/b as )  
WAIT RADIO )  
Chicago, Illinois )Has: 820 kc, 5 kw, D-SS, Dallas, Texas )  
Requests: 820 kc, 10 kw, 5 kw-LS, DA-N-U )

For Construction Permit )

To: The CommissionOPPOSITION TO PETITION FOR RECONSIDERATION

MIDWEST RADIO-TELEVISION, INC., licensee of Station WCCO, Minneapolis, Minnesota, by its attorneys, hereby opposes the Petition filed on June 10, 1970 by WAIT Radio for reconsideration of the Commission's Memorandum Opinion and Order of May 11, 1970 denying WAIT's application for nighttime operation on 820 kc in Chicago, Illinois. In support thereof, it is respectfully stated as follows:

1. Midwest Radio-Television, Inc. operates Station WCCO, a Class I-A clear channel station on 830 kc at Minneapolis, Minnesota.

2. WAIT Radio operates Station WAIT daytime only on 820 kc in Chicago, Illinois. On May 7, 1967 WAIT tendered an application for nighttime operation on 820 kc, together with a request for waiver of several Commission Rules which would bar such operation.

3. On October 25, 1967, the Commission denied WAIT's Petition and returned its application as unacceptable for filing; and on January 24, 1968, the Commission denied WAIT's Petition for Reconsideration.

4. WAIT thereupon appealed to the United States Court of Appeals for the District of Columbia Circuit, and on June 24, 1969 the Court remanded the case to the Commission for further consideration. The Court, however, did not rule on the substantive issues, but merely directed the Commission to afford a "hard look" to WAIT's proposal and to " . . . state its basis for decision with greater care and clarity than was manifested on its disposition of WAIT's claims . . ." WAIT Radio v. F.C.C., 418 F. 2d 1153, 16 RR 2d 2107 (1969).

5. Pursuant to the Court's mandate, the Commission gave WAIT an opportunity to submit new evidence and on February 9, 1970 heard oral argument en banc. The Commission thereafter released a detailed Memorandum Opinion and Order on May 11, 1970, concluding that there are "no compelling reasons to grant a waiver of our rules", and rejecting WAIT's application. WAIT now seeks reconsideration of this action.

6. It should be noted at the outset that WAIT submits no new facts or data at this juncture. All of WAIT's contentions were carefully considered and were effectively disposed of by the Commission in its Memorandum Opinion and Order of May 11, 1970.

7. Furthermore, WAIT distorts the basis for the Commission's decision by implying that its application was denied solely on the finding that "its nighttime operation is objectionable because the Commission fears its hand would be tied when and if it desires to break down 820 kc as an unduplicated clear channel by rule-making". Wait asserts, on this premise, that "the objection can be met by an offer to accept a waiver of the clear channel rules conditional upon a final Commission Order at any time in the future breaking down the 820 kc frequency as a clear channel through rule making". WAIT glosses over the fact, however, that the Commission found that its proposed operation would cause interference to existing operations.

8. Thus, the Commission determines that WAIT's proposal "would cause interference, in violation of [the] rules, within the secondary service area of WBAP/WFAA, Fort Worth/Dallas, Texas". The Commission found that WAIT's proposal would cause widespread interference within the 0.5 mv/m- 50% skywave contour of Station WBAP, a Class I-A station on 820 kc in Fort Worth, Texas, <sup>1/</sup> and in addition would cause interference "beyond both WBAP-WFAA's nighttime 0.5 mv/m 50% skywave contour, and well within the secondary service area of WCCO, a Class I-A station on adjacent clear channel 830 kc, and WGY, a Class I-B station on adjacent Channel 810 kc."

<sup>1/</sup> Station WBAP formerly operated on a share-time basis with WFAA, Dallas, Texas. However, on April 22, 1970, the Commission authorized fulltime operation by WBAP on 820 kc.

Although WAIT argues that the latter interference would not violate the rules and that the interference caused beyond WBAP's nighttime skywave contour would occur in areas boasting a multiplicity of Class I skywave signals, the Commission cogently explained that "when an applicant requests a waiver of the rules which have been promulgated in the public interest, all factors become relevant to that interest".<sup>2/</sup> And the Commission stressed that "this loss of service, in order to provide Chicago with another AM nighttime service in addition to the 25 already there, simply is not in the public interest". Moreover, the Commission found in this respect that WAIT's programming proposal was far from unique.

9. The Commission further noted that WAIT's proposal "would tend to degrade the 820 kc channel and thereby reduce the possibility of locating stations, at some future date, in areas that may have greater need for nighttime aural broadcast service" and "would substantially reduce the service to 'unserved' areas of a proposal to operate on 820 kc in Maine". WAIT's attempt to meet this objection merely by offering to accept a "conditional waiver" must be rejected. In the first place, as noted above, WAIT's proposal would result in interference to

<sup>2/</sup> The Commission correctly found it pertinent to take into consideration the fact that "in addition to the interference caused within and beyond WBAP/WFAA's 0.5 mv/m - 50% nighttime skywave contour, a large area would also lose reception of WCCO and WGY signals where they are not protected from interference under our rules". Clearly, it was not only appropriate but necessary for the Commission to take into consideration the deprivation of recognized but non-protected signals in passing on a request for waiver. See Interstate Broadcasting Co., Inc. v. F.C.C., 116 U.S. App. D.C. 327, 323 F. 2d 797 (1962).

existing operations and this would not be eliminated by a conditional grant. But, aside from this, it would completely subvert the administrative process for the Commission to make grants conditioned upon an agreement that if rule making action is ultimately taken with respect to the frequency involved, the applicant "shall then stand on an equal footing with all other applicants in the rule making proceedings".

10. In accordance with the Court's mandate, the Commission has afforded WAIT's proposal a "hard look" and has set forth in a carefully reasoned and detailed decision the basis for its action. Nothing in WAIT's instant Petition dispels the validity of the Commission's action and its Petition must be rejected.

WHEREFORE, in view of all the foregoing, the aforesaid Petition for Reconsideration of WAIT Radio should be denied.

Respectfully submitted

MIDWEST RADIO-TELEVISION, INC. (WCCO)

By

Peter Shuebruk  
30 Rockefeller Plaza  
New York, New York 10020

Herbert M. Schulkind  
1211 Connecticut Avenue, N.W.  
Washington, D. C. 20036

Fly, Shuebruk, Blume and Gaguine  
Its Attorneys

July 2, 1970

[Certificate of Service Omitted in Printing]

BEST COPY  
from the original

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

In re Application of

Maurice Rosenfield, Lois F. Rosenfield,  
Harold A. Weiss, Robert G. Weiss, and  
Devoe, Shadur, Plotkin, Krupp & Miller,  
a co-partnership, d/b as WAIT RADIO,  
Chicago, Illinois

For Construction Permit

To: The Commission

JOINT OPPOSITION TO PETITION FOR RECONSIDERATION

Carter Publications, Inc., licensee of Standard (AM)  
Station WBAP, 820kc, Fort Worth - Dallas, Texas, and Clear Channel  
Broadcasting Service, by their attorneys, herewith oppose the  
petition of WAIT RADIO for reconsideration of the Commission's  
Memorandum Opinion and Order released May 11, 1970 (FCC 70-486).

In its Memorandum Opinion and Order the Commission for  
the second time refused to waive its basic AM Allocation Rules  
and dismissed the WAIT application for nighttime authorization  
on 820kc as inconsistent with those Rules.

The WAIT Petition for Reconsideration, as stated in its  
caption, is "based upon applicant's offer to accept a waiver  
conditional upon frequency 820kc remaining a clear channel."  
In other words, WAIT stated that it would accept a grant of its  
nighttime application on condition that it terminate that opera-  
tion at such time as the Commission decides to "break down" 820kc  
and assign a nighttime station on that frequency to some other  
part of the country. According to WAIT (Petition, p. 6), such  
a conditional grant would remove the Commission's principal

objection to a grant of the WAIT application, "the need to preserve its flexibility to authorize future operations on 820kc". (Petition, p. 4)

But as even a cursory examination of the Commission's Memorandum Opinion and Order makes clear, the need to preserve flexibility with respect to 820kc was not the only ground for dismissal of the WAIT application. The Commission was equally, if not more concerned about the interference WAIT's nighttime operation would cause to Station WBAP, both within and without the WBAP 0.5 mv/m contour,<sup>1/</sup> as well as to stations operating on frequencies adjacent to 820kc. Thus, at the outset of the discussion of the WAIT proposal (para. 7) the Commission emphasized that "two of the important requirements, inter alia, which the new station on the duplicated clear channel had to comply with were that it protect the dominant station from interference and that it serve 25% 'unserved' area or population." (emphasis supplied) And later in the Memorandum Opinion and Order the

---

<sup>1/</sup> Since Station WBAP operates on a Class I-A frequency, it is entitled to protection beyond its 0.5 mv/m contour to the limit of its service area. See Section 73.182(a)(1)(i) of the Rules. WAIT, therefore, misunderstands the Commission's Rules in arguing (Petition, p. 6, n. 4) that Interstate Broadcasting Co. v. FCC, 323 F. 2d 797 (D.C. Cir. 1963) provides no basis for the Commission's consideration of interference to Station WBAP beyond its 0.5 mv/m contour. Moreover, as the Commission's Memorandum Opinion and Order makes clear, the Interstate case was not cited in reference to the WBAP service area but only in reference to the service provided by adjacent frequency stations.



Commission discussed at length and in detail the interference that would be created by the proposed WAIT nighttime operation (see paras. 10-12), making it absolutely clear that the loss of service that would result from that interference far outweighed whatever gains in service would result from a grant of the WAIT application.

Obviously, this interference would be the same regardless of any "condition" attached to a grant of the WAIT application, and it would continue as long as WAIT remained on the air at night. WAIT's offer to accept a conditional grant therefore begs the essential question presented by its application and provides no basis whatever for a waiver of the Commission's Rules.

Because of WAIT's fundamental misunderstanding of the Commission's Memorandum Opinion and Order, no useful purpose would be served by further extensive discussion of the WAIT petition. The petition does, however, contain two other misconceptions that warrant some comment.

WAIT states (Petition, p. 2) that "the evidence shows that no one listens to WBAP" in the portion of the WBAP 0.5 mv/m contour that would receive interference from the proposed WAIT nighttime operation. But the evidence shows no such thing.

On the contrary, the evidence shows that WBAP has made a special effort to attract listeners outside the State of Texas and in the entire interference area (including the area outside the WBAP 0.5 mv/m contour), and that effort has been successful, particularly in the State of Illinois. See WBAP's opposition to WAIT's first Petition for Reconsideration, p. 4.

WAIT also claims (Petition, p. 8) that the Commission erred in stating that Chicago has 25 AM and 16 FM stations. But the Commission was clearly referring to the number of stations in the Chicago area (including the immediate suburbs of the City) which is in fact the number of stations there, as WAIT has previously conceded in its own waiver request.

In view of the foregoing, the WAIT Petition for Reconsideration should be denied.

Respectfully submitted,

CARTER PUBLICATIONS, INC. (WBAP)

By Michael Finkelstein (per Clerk)  
Michael Finkelstein

Finkelstein & Firestone  
1725 K Street, N. W.  
Washington, D. C. 20006

Its Attorney

CLEAR CHANNEL BROADCASTING SERVICE

By Erwin D. Krasnow  
Erwin G. Krasnow

Kirkland, Ellis, Hodson,  
Chaffetz, Masters & Rowe  
1776 K Street, N. W.  
Washington, D. C. 20006

Its Attorney

[Certificate of Service Omitted in Printing]

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 70-1070  
52660

In re Application of )

Maurice Rosenfield, Lois F. Rosenfield,  
Harold A. Weiss, Robert G. Weiss, and  
Devoe, Shadur, Plotkin, Krupp & Miller,  
A Co-partnership, d/b as WAIT RADIO  
Chicago, Illinois )

Has: 820kc, 5kw, L-SS, Dallas, Texas )  
Requests: 820kc, 10kw, 5kw-LS, DA-N, U )

For Construction Permit )

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1970 Released: October 5, 1970

By the Commission: Commissioner Wells absent.

1. On March 7, 1967, WAIT Radio (hereinafter "WAIT") tendered an application with this Commission requesting authorization to change its existing operation from a daytime-only to an unlimited-time standard broadcast station. Since the applicant's proposal violated certain technical rules, its application was accompanied by an appropriate request for waiver. In its most recent decision of May 6, 1970, 22 FCC 2d 934, the Commission denied, for the third time, WAIT's request for waiver of those rules. <sup>1/</sup> Now before the Commission is a petition for reconsideration of this Memorandum Opinion and Order. <sup>2/</sup> Although it is superfluous to wrestle with arguments carefully considered in our last opinion, in view of the applicant's persistent endeavor to obtain nighttime authorization, we feel disposed to respond briefly to old arguments cast in a somewhat different light.

2. Since 1967, WAIT has petitioned this Commission for authority to operate nighttime on channel 820kc - a clear channel, which under section 73.25 of our rules is reserved for only one nighttime standard broadcast operation and which is now occupied exclusively by WBAP, Dallas, Texas. Without directly challenging the validity of the clear channel rules, WAIT has persistently contended that acceptance of its proposal would not undercut the policy which those rules were intended to promote. Basically, the applicant has shown that notwithstanding the interference its nighttime

<sup>1/</sup> This denial followed remand by the Court of Appeals for the District of Columbia Circuit, WAIT v. FCC, 418 F 2d 1153 (D.C. 1969) and oral argument before the Commission en banc on February 9, 1970.

<sup>2/</sup> The Commission also received and considered responsive pleadings on behalf of Carter Publications, Inc., licensee of standard broadcast station WBAP, 820kc, Fort Worth-Dallas, Texas, Clear Channel Broadcasting Service and Midwest Radio-Television, Inc.

operation would cause within WBAP's 0.5 mv/m-50% skywave contour, this interference would occur in an area which already receives primary aural service from two or more stations. The applicant concludes that since this interference does not occur in an area which receives a meaningful signal from station WBAP, to deny it access to the airways is an "overbreadth" of regulation which abridges its constitutionally protected right of free speech under the First Amendment.

3. WAIT interprets the Commission's most recent decision as reflecting a primary concern for future flexibility in allocating stations on 820kc. Based on this constrained interpretation, WAIT now offers to accept a waiver of our rules conditioned upon a final Commission order, at any time in the future, breaking down the 820kc frequency as a clear channel.

4. Our prior disposition not to accommodate WAIT by granting its request for waiver did not rest exclusively on the fear that we would lose our flexibility in possibly allocating future stations on 820kc. We also discussed, at length, WAIT's failure to show how a waiver of section 73.24 (b)(3)(i) and (b)(3)(ii) of our rules would be in the public interest. Section 73.24(b)(3)(i) requires that a proposal not cause objectionable interference to any existing station, and 73.24(b)(3)(ii) requires that a new nighttime proposal serve 25 percent of an area or population which is without standard broadcast service.

5. As previously noted, WAIT contends that the interference it will cause within WBAP's 0.5 mv/m-50% skywave contour is in an area which is not only served by several other aural facilities, but in an area in which "the evidence shows that no one listens to WBAP...." First, it should be pointed out that WAIT's contention that there is no evidence of a listening audience is not left completely un rebutted. At oral argument before the Commission on February 9, 1970, counsel for WBAP did contend that WBAP received most of its out-of-state entries from a station contest from the State of Illinois. <sup>3/</sup> Nevertheless, none of the parties proffered particularly persuasive evidence regarding audience listening habits in the crescent area of interference and, therefore, the Commission's decision is not predicated on the contentions of any party regarding this issue.

6. More important is the misconstruction WAIT has made of our clear channel rules. Since channel 820kc is an unduplicated clear channel at night, interference to its operation is not limited to the 0.5 mv/m-50% skywave contour. WAIT, however, completely glosses over the interference its operation would cause beyond the 0.5 mv/m-50% skywave contour. In addition, as discussed in our last decision, adjacent channel interference, though not recognized

---

<sup>3/</sup> See record of oral argument at page 26. Counsel for WAIT contended at oral argument that an American Bureau of Research survey showed there was no listening and "over two thousand regular logs have shown one incident of listening to WFAA-WBAP in this range." Id. at p. 8.

as objectionable under our rules, is a relevant consideration in determining what is in the public interest. The applicant, in its petition for reconsideration, not only excepts to our emphasis of the Interstate case, <sup>4/</sup> but most interestingly, claims that WBAP, KCOO, and KBY, not a party to this case, have not shown special circumstances or a listening audience which would warrant taking account of service beyond the protected area. <sup>5/</sup> It seems that the applicant has misconceived its role in this proceeding. It is not WBAP or KCOO who are seeking a waiver of the Commission's rules, but rather, WAIT Radio. The Circuit Court of Appeals for the District of Columbia, in remanding this case to the Commission, very clearly reaffirmed the position taken in Rio Grande Family Radio Fellowship, Inc. v. FCC, in which the Court said that when an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. <sup>6/</sup> It is WAIT which has the burden of showing why it would be in the public interest to waive tested rules and established policies.

7. In addition to our concern for maintaining flexibility over possible future allocations on 820kc and with the interference WAIT's proposal would cause to existing stations, we also fail to find any public interest factors present to warrant a waiver of section 73.24(b)(3)(ii) which requires service to 25 percent of an area or population which is without standard broadcast service. The applicability of this section was thoroughly discussed in our last opinion. The applicant contends, however, that the Commission acknowledged its inapplicability because a clear channel was involved. This contention is grossly incorrect. In referring to certain language in Docket No. 6741, we explicitly said that "however unambiguous the above language may be, it is clearly not intended to preclude application of Section 73.24(b)(3) to WAIT's proposal." <sup>7/</sup> We here incorporate by reference our previous discussion regarding the applicability of that section.

8. The applicant evidently contends that, in any case, the Commission has not dealt accurately with the issues or facts of underserved areas. WAIT argues that America is an urban society and, therefore, metropolitan areas are evidently more in need of aural broadcast than sparsely populated rural areas. Without commenting on the merits of this contention, the Commission only notes that such argument is misplaced since it questions the wisdom of preserving section 73.24(b)(3)(ii) rather than waiving its applicability. The proper forum for considering rule changes is in the broad context of a rule-making proceeding.

<sup>4/</sup> See WAIT Radio v. FCC, 22 FCC 2d 934, 938-939, footnote 20 (1970).

<sup>5/</sup> See petition for reconsideration at page 7, footnote 4.

<sup>6/</sup> WAIT Radio v. Federal Communications Commission, 16 RR 2d 2107, 2112 (1970).

<sup>7/</sup> Supra at footnote 5 at 939.



9. The basic thrust of the applicant's petition for reconsideration is that the cross channel rules and section 73.24(b)(3) may be waived since WAIT is now willing to accept a waiver conditioned on the Commission's decision, sometime in the future, to duplicate service on 820kc. WAIT has misconstrued not only the burden which it has in obtaining a waiver of our rules, but the reasons for our refusal to waive as well. The Circuit Court of Appeals clearly stated that "presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule." <sup>8/</sup> What WAIT now requests is that this Commission grant a waiver until such time as we find a more suitable applicant. It is not so much the precedential inpropriety of granting a conditional waiver which is of major concern to this Commission, but rather, the almost unimaginable consequences of doing so without a concomitant showing that such action is in the public interest.

10. In determining that public interest, we have been confronted with balancing the need to authorize a new nighttime service in the Chicago metropolitan area <sup>9/</sup> against the waiving of our rules without convincing evidence that such action is in the public interest. In our last decision, we found that WAIT's proposal would in no way promote the policies underlying our rules, because WAIT's proposed nighttime operation, in addition to causing interference to the existing service of three stations, would not be unique or serve unserved areas or population. We found, therefore, that waiver of our rules to permit the addition of still another ordinary nighttime service to the multiplicity of such services already available in the Chicago area would not be in the public interest. WAIT's offer to accept a conditional grant does not go to these public interest findings, but only to the narrower reasoning which it erroneously ascribes to the Commission. <sup>10/</sup>

11. WAIT seeks to invoke the overbreadth principle of First Amendment cases contending that "free speech cannot be silenced merely because it fails to support a Commission policy." Although this contention is difficult to fault in the abstract, it falls far short of reality when viewed in the concrete. The goal of the Commission's allocation policy throughout the years has been to permit the maximum efficient use of spectrum space consonant with sound engineering standards, and thus foster rather than impede the exercise of free speech. While maintaining a rational system of allocations, we have managed as a result to assign 4,300 stations - or approximately 40 percent of the entire world's standard broadcast stations - within a 107 channel band. In order to sanction the operation of this many stations, it was necessary to prohibit about 2,000 of these facilities on a controlled basis from operating at night. To do otherwise would have inevitably resulted in fewer usable signals reaching the

<sup>8/</sup> Supra at footnote 7.

<sup>9/</sup> In our last decision, we noted that there were 25 AM and 16 FM stations in the general Chicago area, and not in Chicago, to which reference the applicant, in its latest petition, attributes Commission error.

<sup>10/</sup> We note that making a conditional grant to permit establishment of a new service which may later be withdrawn is not without difficulty. As we said in our Second Report and Order (CATV) in Docket No. 14895, etc., 2 FCC 2d 725, 782, "once entrenched, it is difficult, if not wholly impracticable in the light of the disruption ~~to the public~~ which would result, to take effective action or to attempt to roll back the situation..."

listening public because of the intolerable demands which would have been placed on the already critically congested nighttime band. We believe that this employment of controlled frequency allocation viewed realistically can hardly be equated with restraints upon free speech. For as long as there are substantially more individuals who want to broadcast than there are frequencies to allocate, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Red Lion Broadcasting Co., Inc., et al. v. F.C.C., 395 U.S. 367, 388 (1969).

12. In view of the foregoing, the Commission finds that WAIT has failed to show unique or extraordinary circumstances which would justify a waiver. Accordingly, IT IS ORDERED, that the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple  
Secretary



Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

In re Application of

James H. Arnold, Isaac F. Rosenfield,  
Isaac H. Weiss, Robert C. Weiss, and  
James H. Weiss, Flothman, Krupp & Miller,  
Broadcasters, d/b/a MIDWEST RADIO  
Chicago, Illinois

vs. FCC, Docket No. 70-55, Dallas, Texas  
Respondent: State, Local, FCC-45, DA-K, U

for Construction Permit

RESTATE

Released:

October 13, 1970

The fourth line of paragraph 2 of the Commission's Memorandum Opinion and Order, FCC 70-1070, released October 5, 1970, should read as follows:

operation and which is now occupied exclusively by WBAP, Fort Worth, Texas.

The third line of footnote 2 of the same Order should read as follows:

Fort Worth, Texas, Clear Channel Broadcasting Service and Midwest Radio-

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Napie  
Secretary

7073

5

32

AVAILABLE  
at bound volume

36-3

379A

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 24,762  
\_\_\_\_\_

WAIT RADIO, a co-partnership,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee,*

MIDWEST RADIO-TELEVISION, INC., CARTER  
PUBLICATIONS, INC., CLEAR CHANNEL  
BROADCASTING SERVICE,  
*Intervenors.*

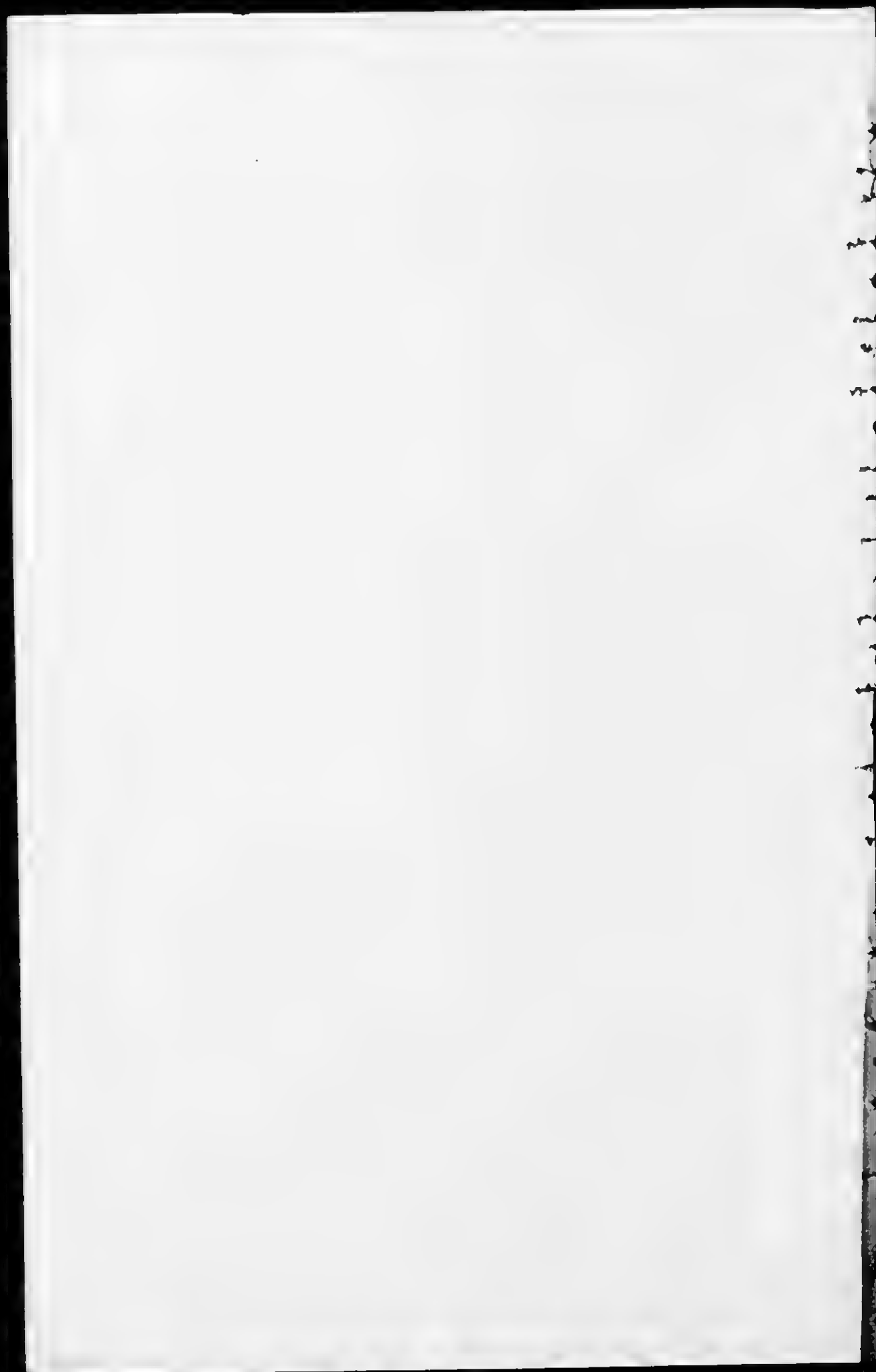
\_\_\_\_\_  
BRIEF FOR APPELLANT  
\_\_\_\_\_

Ramsey Clark —OK  
Kenneth C. Bass, III

PAUL, WEISS, GOLDBERG,  
RIFKIND, WHARTON &  
GARRISON

1775 K Street, N.W.  
Washington, D.C. 20006

*Attorneys for Appellant*



## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	(ii)
STATEMENT OF THE ISSUES .....	1
REFERENCES TO RULINGS .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF AGREED FACTS .....	6
ARGUMENT:	
I. The Commission Decision Conflicts with Its Statutory Mandate .....	8
A. The Commission has not explained, and apparently misunderstands, what constitutes radio service "in the public interest" .....	8
B. WAIT's proposal does not conflict with the policies behind the rules it seeks to have waived .....	13
C. There are no additional factors which operate to overcome the initial presumption that WAIT's proposed additional service would be in the public interest .....	16
II. In This Case the Denial of WAIT's Application Violates the First Amendment as Well as the Communications Act .....	20
III. The Commission's Repeated Failure To Justify Its Decision Warrants Affirmative Relief from This Court .....	23
CONCLUSION .....	24

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Cases:</i>	
<i>Aptheker v. Secretary of State</i> , 378 U.S. 500 (1964) . . . . .	20
<i>Elfbrandt v. Russell</i> , 384 U.S. 11 (1966) . . . . .	20
<i>Goodwill Stations, Inc. v. FCC</i> , 117 U.S. App. D.C. 64, 325 F.2d 637 (1963) . . . . .	13
<i>Industrial Broadcasting Co. v. FCC</i> , No. 23,856 (D.C. Cir., Dec. 16, 1970) . . . . .	11
* <i>Interstate Broadcasting Co. v. FCC</i> , 116 U.S. App. D.C. 327, 323 F.2d 797 (1963) . . . . .	11, 17, 19
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967) . . . . .	20
<i>NAACP v. Button</i> , 371 U.S. 415 (1963) . . . . .	20
<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943) . . . . .	9, 21
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964) . . . . .	9
* <i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969) . . . . .	9, 21
<i>Rio Grande Family Radio Fellowship, Inc. v. FCC</i> , 132 U.S. App. D.C. 128, 406 F.2d 664 (1968) . . . . .	12
<i>Schneider v. New Jersey</i> , 308 U.S. 147 (1939) . . . . .	20
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969) . . . . .	22
<i>Talley v. California</i> , 363 U.S. 60 (1960) . . . . .	20
<i>United States v. Paramount Pictures, Inc.</i> , 334 U.S. 131 (1948) . . . . .	9, 21
* <i>WAIT Radio v. FCC</i> , 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) . . . . .	2, 5, 12, 15, 23

*Statutes and Regulations:*

Communications Act of 1934, 47 U.S.C. § 151, et seq., as  
amended:

Section 303, 47 U.S.C. § 303 (1964) . . . . .	9
Section 307(b), 47 U.S.C. § 307(b) (1964) . . . . .	9
Section 309(a), (e), 47 U.S.C. § 309(a), (e) (1964) . . . . .	8, 10

Regulations under the Communications Act of 1934, as  
amended:

\*Cases chiefly relied on.

(iii)

	<u>Page</u>
47 C.F.R. § 73.21 (1970) .....	13, 19
47 C.F.R. § 73.22 (1970) .....	15
47 C.F.R. § 73.24 (1970) .....	13, 15
47 C.F.R. § 73.25 (1970) .....	13, 15
47 C.F.R. § 73.35 (1970) .....	10
47 C.F.R. § 182 (1970) .....	13, 15
47 C.F.R. § 240 (1970) .....	10
47 C.F.R. § 636 (1970) .....	10

*Other Authorities:*

Barron, Emerging First Amendment Right of Access to the Media?, 37 Geo. Wash. L. Rev. 487 (1969) .....	9
Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565 (1961) .....	13
In the Matter of Amendment of Part 3 of the Commission's Rules Regarding AM Station Assignment Standards, etc., 25 Pike & Fischer, Radio Regulations 1615 (1963) .....	15





IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,762

---

WAIT RADIO, a co-partnership,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee,*

MIDWEST RADIO-TELEVISION, INC., CARTER  
PUBLICATIONS, INC., CLEAR CHANNEL  
BROADCASTING SERVICE,  
*Intervenors.*

---

BRIEF FOR APPELLANT

---

STATEMENT OF THE ISSUES

1. Whether, in the circumstances of this case, the Federal Communications Commission ignored its statutory mandate to "encourage the larger and more effective use of radio in the public interest . . ." and to grant applications as the "public interest, convenience, and necessity" require.

2. Whether the denial of permission to provide additional radio service to 4,400,000 people without violation

of any FCC policies resulted in an "overbreadth" of regulation contrary to the First Amendment.

This same case was before this Court on a prior appeal and was docketed as *WAIT Radio v. FCC, et al.* (No. 21,689 September Term 1967). The opinion remanding the matter to the Federal Communications Commission is reported at 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969).

### REFERENCES TO RULINGS

The initial Commission opinion denying the requested waiver was adopted October 25, 1967 and released October 30, 1967 (FCC 67-1174). It is reported at 10 F.C.C.2d 481 and is reproduced in the Joint Appendix filed in this proceeding beginning at page 130.

The first Commission opinion denying reconsideration was adopted January 24, 1968 and released January 31, 1968 (FCC 68-83). It is reported at 11 F.C.C.2d 547 and is reproduced in the Joint Appendix beginning at page 184.

The decision of this Court remanding the matter to the Commission is reported at 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) and is reproduced in the Joint Appendix beginning at page 189.

The decision of the Commission on remand again denying the requested waiver was adopted May 6, 1970 and released May 11, 1970 (FCC 70-486). It is reported at 22 F.C.C.2d 934 and is reproduced in the Joint Appendix beginning at page 291.

The Commission opinion again denying reconsideration was adopted September 30, 1970, and released October 5, 1970 (FCC 70-1070). It is reported at 25 F.C.C.2d 1016, and is reproduced in the Joint Appendix beginning at page 319.

## STATEMENT OF THE CASE

Appellant, WAIT Radio, is a co-partnership licensed to operate a daytime-only AM broadcast station (WAIT) on 820 kHz from its location in the Chicago area. WAIT is an independent, locally-owned station which broadcasts quality music and public affairs programs designed to appeal to adult audiences. During the day other stations in the United States also operate on the 820 kHz channel. At night, however, Federal Communications Commission regulations provide that only one station in the United States—WBAP, located at Forth Worth, Texas—may operate on that channel.<sup>1</sup> In order to provide a nighttime “clear channel” for WBAP, WAIT and other stations are forced to stop transmitting programs to their local audiences. The purpose of this “clear channel” rule is to provide some form of radio service to certain remote or “white” areas of the country, like the mountain ranges of Wyoming, that are too sparsely populated to provide a viable economic base for their own local stations. Because of certain engineering phenomena<sup>2</sup> radio signals travel longer distances at night, and as long as there is no interference from another station on the same channel, the “clear channel” station can provide radio service to these “white areas.” Even at night, however, there is a definite limit to the distance the signals can travel and still be received.

On March 7, 1967, WAIT filed an application with the FCC requesting authority to operate full-time on 820 kHz, using a directional antenna. (App. 1).<sup>3</sup> Engineering data

---

<sup>1</sup>When the case began, WBAP shared the 820 kHz channel with WFAA. While one station broadcast on 820 kHz, the other was on 570 kHz. On April 22, 1970, the FCC approved requests by these stations to terminate the shared-time arrangement. WBAP now operates only on 820 kHz, while WFAA operates only on 570 kHz. As a result of this modification, WFAA withdrew as a party in this case.

<sup>2</sup>Further descriptions of this and other relevant technical concepts are set forth in the Technical Appendix to this brief, *infra*, p. A-1.

<sup>3</sup>References to “App.” are to the Joint Appendix filed simultaneously with this brief.

submitted with the proposal indicated that WAIT would provide additional nighttime radio service to some 4,400,000 people in the Chicago area. The proposal also indicated that there would be some interference, as defined in FCC regulations, with the signal of WBAP, but that such interference was drastically reduced by use of the directional antenna. (App. 66, 71).

In the application WAIT pointed out that there would be absolutely no interference under its proposal to any "white area," that is an area that did not have at least one nighttime station providing primary radio service.<sup>4</sup> (App. 61). Since the only reason for the "clear channel" rules is to provide radio service to "white areas," WAIT's proposal did not conflict with the policies those rules sought to further. WAIT therefore argued that waiver of those rules was appropriate and requested an opportunity to present the matter orally before the full Commission. (App. 72). Oppositions to the application were filed by WBAP, the Clear Channel Broadcasting Service (a trade association of clear channel stations) and WCCO, a Minneapolis, Minnesota, station operating on 830 kHz.<sup>5</sup> (App. 80, 91, 105).

The FCC denied the request for oral presentation and refused to accept the WAIT application for filing. In a memorandum opinion the Commission explained only that the proposal would violate the rules and thus was unacceptable. (App. 130). Since WAIT had acknowledged that its proposal violated the literal terms of the rules, and requested a waiver, the Commission's reasoning seemed inadequate. WAIT petitioned for reconsideration (App. 134), additional oppositions were filed (App. 167, 180, 183), and the Commission again denied the waiver request and

---

<sup>4</sup>"Primary" radio service is service using the groundwave of a station. Such signals are more easily received than "secondary," or skywave signals. See Technical Appendix, *infra*, p. A-1.

<sup>5</sup>WFAA also filed oppositions during the first proceeding before the Commission. App. 78.

returned the application as unacceptable for filing (App. 184).

Since the FCC had given no reason for its action other than the admitted fact that, absent the requested waiver, the proposal violated the rules, WAIT sought relief in this Court. After briefing and argument, this Court remanded the matter to the Commission, directing it to give the application the "hard look" it deserved and to justify its decision on a reasoned basis. *WAIT Radio, supra*. (App. 189).

Since WAIT was unable to understand the reasoning behind the FCC decision, it requested a specification of the issues and oral presentation before the Commission. (App. 204). Specification of the issues was denied, but permission to submit additional technical data and to present oral argument was granted. (App. 224).

Subsequently WAIT submitted new information on the number and quality of radio signals available to listeners in the WAIT-WBAP interference area. This data showed that not only was there no "white area," *i.e.*, location without any primary radio service, but in fact there was no "grey area," *i.e.*, location with only one primary service, either. All of the area involved was served by at least 2 primary signals. Moreover 95.7% of the area received 3 or more primary signals, and fully 59.7% received 4 or more primary signals. (App. 234). All of these radio signals were "primary," that is groundwave signals of high quality and reliability. The WBAP signal in that area, on the other hand, was a "secondary," or skywave signal that is inherently erratic and thus less desirable from a communications standpoint than a primary signal.<sup>6</sup> In addition there were between 13 and 20 "secondary" signals at least as strong as WBAP's at all locations in the interference area. (App. 148). Finally WAIT contended that no one in the interference area listened to WBAP. (App. 140-142, 260, 261).

---

<sup>6</sup>In its brief on the first appeal the Commission acknowledged the superiority of groundwave service. Brief for Appellee, *WAIT Radio v. FCC, supra* (No. 21,689 Sept. Term 1967), at 4, n. 2.

At oral argument before the Commission WAIT stressed that its application would in no way interfere with the policies underlying the FCC's "clear channel" rules. Not only would the proposal fully protect WBAP's service to "white areas," it provided an extra margin of safety since the entire interference area received at least 2 primary signals.

The Commission again denied the waiver request. This time the memorandum opinion emphasized that approval of the WAIT application might impair future allocations on the 820 kHz channel. (App. 291, 294-96). At this point WAIT thought it finally understood the Commission's reasoning and petitioned for reconsideration, explicitly agreeing that any waiver of the rules would be conditioned on 820 kHz remaining a "clear channel," and that if the Commission ever decided to authorize duplication of service on that channel, WAIT was prepared to stand on an equal footing with any other applicant and would not rely on any "grandfathering" or reliance arguments. (App. 301, 304-05).

The Commission denied the petition for reconsideration, this time repeatedly stating that the WAIT proposal would not be "in the public interest." (App. 319). The Commission's view of what was "in the public interest" was never explained, rather there was a simple, repeated recitation that this proposal did not serve that interest. (App. 320 ¶ 4; 321 ¶¶ 6 & 7; 322 ¶¶ 9 & 10). This appeal followed from that decision.

### STATEMENT OF AGREED FACTS

There are no material factual disputes involved in this case. Although there is a substantial amount of engineering evidence in the record, there is almost total agreement on the technical matters involved. The real issues are entirely legal ones involving the proper standard and definition of "public interest," and the basic concept of waiver of administrative regulations. In order to avoid unnecessary detailed



discussion of the technical matters, WAIT would here simply point to the significant technical aspects of this case upon which the Commission has apparently relied. The parties agree on the validity of these facts, but vigorously disagree on the proper conclusions to be drawn.

1. The WAIT proposal would cause some slight interference with WBAP's signal which conflicts with the literal terms of the Commission rules. (App. 130-131, 294). WAIT contends there is no conflict with any policy behind these rules.

2. All of the interference area, in which about 2,170,000 people reside, is served by at least two nighttime primary radio signals and 13 secondary signals. (App. 294, 148). Most (95.7%) of the area is served by at least three primary signals. (App. 234, 294). All of these are signals in addition to the WBAP secondary signal in the area. WAIT's proposal would cause no interference to these signals.

3. The WAIT proposal would provide an interference-free signal to approximately 4,400,000 people in the Chicago area. (App. 66).

4. The proposal would cause some interference with the WBAP signal beyond that station's "0.5 mv/m-50%" contour which does not violate Commission rules. (App. 296).

5. The proposal would cause some interference with the signals of WCCO and WGY which also does not violate FCC rules. (App. 296).

6. The proposal would not provide the first nighttime primary service to any "white area."

7. WAIT would provide interference free signals to 69.3% of the people within the so-called "normally protected contour" of its proposal. (App. 66, 295).

In addition to these factual agreements, WAIT and the Commission are in an agreement on two other important points:

1. The purpose of the clear channel regulations is to utilize nighttime signals to provide service to areas without primary broadcast service. (App. 294).

2. A total silencing of a radio station, to avoid station interference, when a partial silencing would as effectively further Commission policies, is an "overbreadth" of regulation barred by the First Amendment. (App. 292, 293).

## ARGUMENT

### I. THE COMMISSION DECISION CONFLICTS WITH ITS STATUTORY MANDATE.

#### A. The Commission has not explained, and apparently misunderstands, what constitutes radio service "in the public interest."

The basic purpose of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, under which the FCC operates is simple enough. The Commission has a mandate to insure that the maximum feasible use of broadcast resources is attained. Congress early recognized that absent some regulation of radio broadcasting, interference would inevitably result from attempts by many people to use the limited channels available. In order to insure that effective signals got through, it became necessary to restrict the number and terms of operation of radio stations.

This statutory scheme is spelled out clearly in several places. Section 309(a) of the Act provides:

"... [T]he Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be

served by the granting thereof, it shall grant such application."

Further, Section 303 states:

"... [T]he Commission from time to time, as public convenience, interest, or necessity requires, shall—

"g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest ..."

Finally, Section 307(b) directs the Commission

"... to make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a[n] ... efficient ... distribution of radio services to each of the same."

The regulation of radio is affected also by constitutional considerations. The First Amendment guarantee of free speech applies to radio as well as other forms of communication. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). This protection extends both to the broadcaster's right to speak, and the listener's right to hear. "The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'" *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943).

The First Amendment insures free speech by enlarging the opportunities for every person to speak and be heard by willing listeners. See *New York Times v. Sullivan*, 376 U.S. 254, 269-71 (1964). This concept applies with special force in the area of broadcast regulation. Because the possibilities of radio communication are limited by physical factors, it is especially important that administrative regulations encourage the fullest possible use of every frequency. Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); see also *Barron*, *An Emerging First Amendment Right of Access to the Media?*, 37 *Geo. Wash. L. Rev.* 487, 502-08 (1969).

The consequences of this analysis seem clear. Any proposal for additional radio service starts with an automatic presumption that the new service would be "in the public interest."<sup>7</sup> Thus if a proposal indicates that it will provide radio service to the public which is not presently available, that new service in and of itself is enough to raise a presumption that granting the proposal is "in the public interest." The Commission can reject the application only if after considering all factors it concludes that this initial presumption of public benefit is outweighed by some other adverse considerations. For example, the new service might cause such interference to existing service that there is no net public benefit. Or the proposal might violate some other valid Commission policy, such as insuring diversity of ownership of broadcast stations.<sup>8</sup> The crucial point is that any application to provide additional service starts out with a presumption that granting it will be in the public interest. The Commission's obligation is to make the grant unless this presumption is overcome by other considerations.<sup>9</sup>

This concept of a presumption of public interest is modified slightly in the waiver situation. When the application

---

<sup>7</sup>The Act itself reflects this presumption. The Commission is not required to hold a hearing unless it is unable to find that the application is in the public interest, or unless some material fact is in dispute. 47 U.S.C. § 309(e). This provision necessarily implies that applications for new service are normally in the public interest and can usually be approved without protracted hearings.

<sup>8</sup>See §§ 73.35, 73.240, 73.636 of the FCC Rules.

<sup>9</sup>While the Commission opinions are by no means clear on this point, it appears that in this case the FCC is requiring some demonstration of public interest beyond the showing of additional service not presently available. See, e.g. App. 322. WAIT simply cannot understand what additional showing the Commission has in mind. Nowhere is this public interest defined, and the suspicion arises that invocation of the phrase is nothing more than another way of saying that the application is denied. Absent some explanation, statements that the proposal is not in the public interest are not reasons, they are merely conclusions.

discloses that the proposal would violate the terms of some Commission rule, then the initial presumption is counter-balanced by the rule itself. This is so because the rule is a form of legislative judgment that proposals violating the rule are not, on first impression, in the public interest. See *Interstate Broadcasting Co. v. FCC*, 116 U.S. App. D.C. 327, 331, 323 F.2d 797, 801 (1963). Rather than having to decide each and every case by individual balancing of considerations, the Commission is permitted to make some general judgments, formulate rules to express these conclusions, and then reject applications which do not conform with the rules.<sup>10</sup>

In order to obtain a waiver of the rule, the applicant must somehow overcome this adverse presumption created by the rule. WAIT believes that there are two distinctly different types of waiver requests, requiring two quite different modes of analysis. In the first case the application violates not only the literal terms of the rule, but also conflicts with the policy underlying the rule. In such a case the only way to obtain a waiver is for the applicant to show that certain other considerations of public interest act in concert with the presumption attached to additional service, and that the combined effect of all the factors is to outweigh the presumption against public interest contained in the rule. In this case, analytically, the rule is not "waived" until the entire balancing process is completed.

There is a second type of waiver proceeding in which the applicant can demonstrate that while the proposal conflicts with the literal provisions of the rule, it does not conflict with the underlying policies that give the rule its validity. This case presents such a situation. In such a situation, if the applicant can demonstrate that no violation of policy

---

<sup>10</sup>All the factors relied upon by WAIT are unique to this application and were not considered by the FCC when it formulated the rules involved. Cf. *Industrial Broadcasting Co. v. FCC*, No. 23,856 (D.C. Cir., December 16, 1970), slip opinion at 6.

is present, then at that point the rule ceases to have any presumptive effect. This conclusion follows because a rule is only an attempt to use a verbal formula to express in general terms a policy conclusion. Application of those terms without consideration of the policy behind them is essentially an irrational attempt to apply the rule for its own sake. The basic principle involved has long been at the core of the "rule of law." The common law contained the idea—"when the reason for the law ceases, the law itself also ceases."<sup>11</sup> The principle is as valid in administrative law as it is in construing legislative enactments.

Once the applicant has shown that the policy is not violated, the rule immediately ceases to be involved, the adverse presumption disappears, and the applicant is back at the starting point with the full benefit of the favorable presumption attached to any proposal for additional radio service. At this point, the application must be granted, unless the Commission concludes that other factors now step in to outweigh the presumption in favor of the application.

On the prior appeal, Judge Leventhal articulately expressed the proper role of waivers in administrative law. "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio, supra*, at 321, 418 F.2d at 1157. It is true, as the Commission frequently points out, that "[a]n applicant for waiver faces a high hurdle even at the starting gate. . . . [I]t must plead with particularity the facts and circumstances which warrant such action." *Rio Grande Family Radio Fellowship, Inc. v. FCC*, [132 U.S. App. D.C. 128, 130, 406 F.2d 664, 666 (1968).] *WAIT Radio*, at 321, 418 F.2d at 1157. This does not mean, as the Commission apparently feels, that the initial difficulties are insurmountable.

---

<sup>11</sup> The Latin phrase was "cessante ratione legis, cessat et lex ipsa."

**B. WAIT's proposal does not conflict with the policies behind the rules it seeks to have waived.**

WAIT seeks waiver of certain Commission rules which by their literal terms bar this application.<sup>12</sup> These rules are all based on the same "clear channel" policy. WAIT and the Commission agree that the purpose of these rules is to provide nighttime radio services to "white areas" which otherwise would not receive usable radio signals. (App. 294). WAIT has in this case conclusively demonstrated that its proposal would not conflict with that policy since it would result in absolutely no objectionable interference with WBAP's "clear channel" signal in any "white area."

Commission rules go into considerable detail to spell out what constitutes "objectionable interference." For Class I-A stations like WBAP, the rules specify that stations operating on the same channel must not interfere with the "clear channel" station within that station's "0.5 mv/m-50% contour."<sup>13</sup> This rule reflects a decision made by the Commission during long consideration of the "clear channel" policies beginning in the 1950's. At that time, the Commission undertook extensive rulemaking investigations to determine whether the public interest would best be served by "breaking-down" some of then existing 25 "clear channels" and allowing additional nighttime operation on some of those channels. See generally *Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 565 (1961); *Goodwill Stations, Inc. v. FCC*, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). The result of this study was a decision

---

<sup>12</sup>The rules involved are in §§ 73.21, 73.25, 73.182(a)(1)(i) and 73.182(w). Section 73.24(b)(3)(i) incorporates by reference the interference standards of § 73.182. All the referenced sections of the FCC rules are set out in Title 47 of the Code of Federal Regulations. The section designations in C.F.R. correspond to those in the FCC Rules.

<sup>13</sup>Section 73.182(a)(1)(i). This concept is discussed in the Technical Appendix, *infra*, p. A-3.



to break-down 13 of the 25 channels. The Commission also decided, however, that the new stations on those channels must observe certain technical requirements. One such requirement was that there would be no interference within the 0.5 mv/m-50% contour of the existing "clear channel" station. The reason for adopting this rule was simple enough. Engineering evaluations had shown that there was no sense in trying to protect the "clear channel" station beyond this contour since the signal beyond those points was so weak and erratic as to be virtually useless. Therefore, protecting the signal beyond those limits would be a senseless waste of available broadcasting space.

In analyzing the extent to which its proposal would cause interference, WAIT has therefore used the same 0.5 mv/m-50% contour the Commission requires be protected. The parties agree that there is some interference within that contour, but that the entire area of interference is served by at least two nighttime primary signals and thus there is no "white area" within the protected contour which would receive interference from WAIT's proposed operation. Since there is no "white area" to be protected by applying the clear channel rules in this situation, the policy behind the rules cannot serve as a basis for denying the application. If the policy considerations are absent, then the rules must necessarily be waived, otherwise the prohibition is without a rational basis.

The Commission has contended that WAIT's proposal would violate another rule, the so-called "25% white area" requirement. Essentially, this rule requires that proposals for additional nighttime radio service must provide a first nighttime primary service to at least 25% of the proposed interference-free area of service. WAIT concedes that its proposal would not provide the first primary service to any area, but does not feel that that fact and this rule can validly be applied to deny the application.

In the first place WAIT believes that this rule does not apply to this case. The rule is set forth in two different

places, each dealing with situations other than the one here. Section 73.24(b)(3)(ii)<sup>14</sup> provides that a proposed additional nighttime service must "provide a first primary AM service to at least 25 percent of the area within the proposed interference-free nighttime service contour or at least 25 percent of the population residing therein." When this rule was promulgated, the Commission clearly stated:

"We do not here consider the question of nighttime operation on Class I-A channels. This is an entirely separate problem involving non-engineering considerations."<sup>15</sup>

WAIT's application falls squarely with that exception. The 820 kHz channel is identified as a Class I-A channel. See §§ 73.25(a), 73.182(a)(1)(i).

Section 73.22(b) provides that additional nighttime service on one of the duplicated clear channels must also satisfy the 25% rule. This provision clearly states that it applies only to "Class II-A" stations. Section 73.21 defines a Class II-A station as "an unlimited time Class II station operating on one of the channels listed in § 73.22 . . . ." The 820 kHz channel is *not* one of the channels listed in § 73.22. See § 73.22(a). Therefore this rule is also inapplicable to WAIT's proposal.

Not only is the rule inapplicable, the possible policies behind this rule are completely absent in this case. One possible policy of the 25% rule is to further the basic policies of the clear channel rules to provide nighttime service to white areas. This was the conclusion reached by this Court on the first appeal. *WAIT Radio, supra*, at 318,

---

<sup>14</sup>All references to Sections are to the FCC Rules. The provisions also appear in Title 47 of the Code of Federal Regulations under the same section numbers.

<sup>15</sup>See *In the Matter of Amendment of Part 3 of the Commission's Rules Regarding AM Station Assignment Standards, etc.*, 25 Pike & Fischer, Radio Regulations 1615, at 1631, n. 37 (1963).

418 F.2d at 1154, n. 2. If that is the policy justification for the rule, WAIT has already shown its proposal does not conflict with that policy.

A second possible policy served by the rule is an attempt to avoid further congestion during nighttime hours without any offsetting new service to white areas. This policy cannot validly be applied to WAIT since it seeks operation on a channel that is presently occupied only by WBAP and thus would not become congested by the addition of WAIT's single voice. The Commission admits that there is no problem of congestion on the 820 kHz channel presented by WAIT's application. (App. 296).

Thirdly, the Commission may be trying to retain future flexibility by simply not making any present nighttime authorizations that fail to meet the rule in order to keep all channels open for future proposals that would meet the rule. This possibility is strongly indicated by the Commission's repeated references to future flexibility in its initial decision on remand denying the waiver. (See App. 294-95, 296, 298-99, 300). The basis for applying this policy, however, was eliminated when WAIT stated in its Petition for Reconsideration that it was willing to accept a conditional waiver which would not prevent the Commission from later deciding to allow duplication of the 820 kHz channel by some proposal that would meet the 25% rule. In these circumstances application of that rule would amount to applying the rule simply because it exists, ignoring the reasons behind it.

**C. There are no additional factors which operate to overcome the initial presumption that WAIT's proposed additional service would be in the public interest.**

Since WAIT demonstrated that none of the policies behind the rules apply to its application, the Commission had to waive those rules. Moreover, since the FCC never advanced any valid arguments showing that WAIT's proposal

is not in the public interest, it was required to grant the request to provide additional nighttime service. The Commission has never explicitly stated just how much weight is attached to each of the numerous factors it has discussed, but none of them alone or all together amount in this case to any substantial reasons for the denial.

At several points the Commission has in effect stated that Chicago already has enough radio stations. (See, e.g., App. 294, 296, 297). Apparently the Commission feels that there is some indefinite ceiling on the number of stations allowed in a given area, regardless of other factors. Such a position is simply untenable. Given the statutory mandate to maximize the utilization of the radio spectrum, further supported by the constitutional requirement that free speech be limited as little as possible, it is *always* desirable to provide additional service, again assuming no conflict with valid Commission policies.<sup>16</sup>

Secondly, the Commission has pointed to the interference WAIT's proposal would cause to WBAP beyond the protected 0.5 mv/m-50% contour, and to WCCO and WGY. (App. 296). The Commission recognizes that this interference does not violate the FCC's own rules for determining objectionable interference and moreover it occurs in areas abundantly served by other signals. (*Id.*). Nevertheless the Commission infers that this interference shows the proposal is not in the public interest. This argument is contrary to the decision of this Court in *Interstate Broadcasting Co.*, *supra*. There the Court stated:

"The concept of a protected contour implies a legislative judgment by the Commission that new services which destroy an existing service beyond

---

<sup>16</sup>At times the Commission appears to feel that further radio service in metropolitan areas can never be in the public interest. If this is so, the policy is of dubious validity, especially when demographic trends indicate continuing population increases in urban areas. These population shifts require *more*, not less, service in urban areas if the public interest is to be fully served.

that contour are normally more in the public interest than the service they destroy. In effect the Commission's rules embody this judgment. It is a reasonable one and within the Commission's discretion." *Id.* at 331, 323 F.2d at 801.

That decision also states that reliance on interference beyond the normally protected contour can be considered only where special circumstances are demonstrated. *Id.*

The Commission has mistakenly concluded that the burden of proving special circumstances is shifted to the applicant in this waiver proceeding. (See App. 296, 321). This mistake flows from a failure to realize that this waiver proceeding actually involves a two-stage process. The initial burden of demonstrating the absence of any conflict with the policies was indeed WAIT's. But once that burden was overcome, and the conflict with the policy behind the rule was eliminated, then the burden of proving public interest remained where it was. In this case since WAIT made out a case for the waiver, it is the Commission, or the intervenors, who had to demonstrate special circumstances for considering interference beyond the normally protected contours. That burden simply was not met.

The Commission's position on this issue also is wrong because it requires WAIT to prove a negative proposition by showing why the Commission should *not* consider interference which is not recognized under the rules. The only parties in a position to make such a showing are the other stations whose signals are assertedly affected.

A third possible reason alluded to by the Commission is the fact that WAIT's proposal would provide interference-free service to only 69.3% of the people and 19.5% of the geographic area within the so-called "normally protected" contour. (App. 295). Thus it is implied that WAIT's proposal is "inefficient" since it would not serve all the people and area within that contour. This factor is not a valid reason for denying the application.

In the first place the FCC rules themselves demonstrate that the concept of "normally protected contour" has little relevance to a proposal like WAIT's to operate during the nighttime on an unduplicated clear channel. Section 73.21 (a)(2) specifically states that the primary service area of a Class II station like WAIT operating on a clear channel "is limited by and subject to such interference as may be received from Class I stations." In other words, WAIT's proposed service area is limited by the interference it would receive from WBAP and thus by definition its primary service area is *not expected to be* the so-called "normally protected contour." See also *Interstate Broadcasting, supra*, at 330-31, 323 F.2d at 800-01.

Moreover, as WAIT demonstrated in its engineering statements, the concept of a "normally protected contour" has little relevance in the actual allocation practices of the Commission. That evidence demonstrated that since 1946 the FCC has virtually ignored the nighttime normally protected contour concept. (App. 251). This evidence was not contradicted by the Commission. For the Commission to deny this application merely because it was not more efficient would clearly be an overbreadth of regulation. Even if the proposal would provide new service to only 5% of the people in the "normally protected contour," that slight additional service would still be in the public interest.

The final factor frequently mentioned by the Commission is the need for maintaining "flexibility" in frequency allocation. (See App. 294-95, 296, 298-99, 300). That reason disappeared when WAIT offered to take a conditional waiver. In essence WAIT is willing to provide an additional voice at this time—a voice that no other station proposes to offer—and become silent again if at some future time its service conflicts with other proposals that are more in the public interest.<sup>17</sup> To keep WAIT mute just

---

<sup>17</sup>Occasionally the question of "super power," or substantial increases in power used by existing stations, has arisen. See App.

in case some later proposal comes along, however, is to needlessly waste a valuable resource. This denial is especially unfortunate since the Commission has already wasted this opportunity for new service during the almost four years this application has been pending. It must be remembered that the radio spectrum is not a "wasting asset" like coal, oil or clean air. Operating a station does not result in any irreversible change to the atmosphere. The operation can be stopped at any time and conditions will be the same as they were before the operation began. WAIT's operation in the interim between now and some hypothetical time in the future could not impair the ability of future operations of a different nature.

## II. IN THIS CASE THE DENIAL OF WAIT'S APPLICATION VIOLATES THE FIRST AMENDMENT AS WELL AS THE COMMUNICATIONS ACT.

The Supreme Court has in recent years clearly enunciated the principle that legal restrictions which affect First Amendment values must be narrowly drawn in order to avoid excessive and hence unconstitutional inhibitions of speech and press. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). See also *Talley v. California*, 362 U.S. 60 (1960); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

In *Schneider v. New Jersey*, 308 U.S. 147 (1939), the Court held unconstitutional a municipal ordinance which flatly prohibited the distribution of leaflets. The Court

---

106, 125-26, 131. Such increased power would result in additional interference from and to the WAIT proposal. WAIT has, however, consistently stated that its waiver request would be conditioned on no change in present power limits.



recognized the valid governmental purpose of preventing littering, but concluded that the goal could be attained by restrictions less broad than a complete ban on distributing leaflets.

It is settled that the First Amendment applies in the context of radio regulation. *Red Lion Broadcasting, supra*, at 386; *Paramount Pictures, supra*, at 166. It is also accepted that a regulation which is a valid exercise of the powers conferred by the Communications Act is not a violation of the First Amendment. *National Broadcasting, supra*. This does not mean that any regulation issued by the FCC is thereby immune from scrutiny under First Amendment principles, but only that radio is not immune from governmental regulation because it is a form of speech. In deciding what regulations are valid exercises of the powers delegated by the Communications Act, First Amendment principles are highly relevant, however.

The accepted basis for radio regulation is that absent orderly regulation, there would be communications chaos. The early experience without regulation soon demonstrated that some control was essential. Because the useful radio spectrum is limited by laws of physics, the number of stations permitted to operate must similarly be somehow limited. "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *National Broadcasting, supra*, at 226.

Since radio is affected by First Amendment considerations, regulations which silence stations more than is necessary in order to preserve orderly communication are inherently suspect as overly-broad restrictions. The Commission now seems to agree on this point. (App. 293). WAIT has already demonstrated that application of FCC rules to prohibit its proposed operations cannot be justified as an attempt to preserve orderly communication. WAIT's proposal simply will not disrupt any signal in any white area, and

the only area in which any objectionable interference will occur is one abundantly served by signals of far better quality than that provided by WBAP in that area. (App. 147-152, 216, 285).

The Commission seems to feel that arguments based on the First Amendment are simply another way of phrasing the statutory arguments. Such a position misses the central point of the First Amendment argument. It is true that the Communications Act itself requires regulations which maximize the utilization of available radio facilities, but it is the First Amendment which gives this statutory mandate special importance and requires a higher degree of precise administrative regulation than is necessary in non-First Amendment areas. The decision in this case indicates that the Commission does not fully appreciate that situation.

WAIT is in essence asking for relatively little. It proposes to operate under conditions engineered to insure that no unnecessary or objectionable interference will result to any other station. It is willing to condition this operation on preservation of present FCC allocation policies, and willing to cease operations if future changes in those policies are incompatible with its own operations. WAIT can provide another voice for the people in the Chicago area. Those people have a protected right to listen to WAIT Radio that is as important as WAIT's right to broadcast if not more so. *Cf. Stanley v. Georgia*, 394 U.S. 557 (1969). The Commission simply has not presented any valid reason why such limited operation should not be permitted. None of the asserted reasons survive analysis, and in the end the Commission can only conclude that, in its view, the proposal does not serve an undefined, unstated concept of the "public interest."

Administrative regulation too often evades judicial supervision by invocation of the magic words "public interest." Courts are understandably reluctant to upset agency decisions that are based on expert opinions and technical considerations. The Commission's decision in this case at first

glance appears to be just such an example of expert judgment based on technical factors. As we have demonstrated, however, this appearance is illusory. The Commission in this case is trying to invoke technical rules while ignoring the actual policies which justify those rules.

WAIT can only conclude that the Commission, despite its protest to the contrary (App. 295), simply does not understand the place of waivers in the administrative process. It is indeed administratively simpler to draw rules which attempt to reflect policies and then apply the rules mechanically without consideration of the policies, but this Court has already indicated such a pattern of regulation is invalid.

### III. THE COMMISSION'S REPEATED FAILURE TO JUSTIFY ITS DECISION WARRANTS AFFIRMATIVE RELIEF FROM THIS COURT.

The FCC has attempted on four different occasions to justify the denial of WAIT's application. Each time it has tried to do so, WAIT has convincingly pointed out the errors in the Commission rulings. Each time the Commission has responded by changing the "reasons," but adhering to the decision. In the first set of proceedings the Commission gave no reason at all for its actions. This Court clearly rejected such a process of perfunctory denial by simply invoking general rules. As the Court stated, "promulgating rules of general application . . . does not relieve [the Commission] of an obligation to seek out the 'public interest' for particular, individualized cases." *WAIT Radio, supra*, at 321, 418 F.2d at 1157.

In spite of this Court's directive to give this application a "hard look" the FCC on remand simply affirmed its prior ruling by emphasizing the need to "preserve flexibility." When WAIT suggested an alternative that would fully preserve that flexibility, the Commission turned around and based its denial solely on a repeated invocation of some undefined "public interest." Since the Commission itself

has not defined this elusive concept, one can only conclude that the latest decision is nothing more than another version of the first decision—in other words, a simple denial without any justification based on reasoned elaboration of valid policy considerations.

The parties in this case have produced a full record before the Commission. It had ample opportunity to study those facts, this Court's opinion, and the concept of the public interest it is supposed to serve. In spite of four opportunities, it has been unable to explain rationally the denial of WAIT's proposal to add a new voice to the radio spectrum. All of the asserted reasons have been proven invalid, and there are no more possible reasons to assert. The FCC's constant shifting of grounds on each occasion gives rise to the suspicion that it too recognizes there are no valid reasons for the denial. The Commission has already wasted this space during the four years this case has been pending. Further waste is simply not in the public interest. In such circumstances it is entirely proper for this Court to direct the Commission to waive the rules barring the proposal, accept it for filing, and grant the request. The parties are, it is true, required to exhaust their administrative remedies, but this requirement cannot permit an agency to avoid its responsibilities by exhausting the parties. There must be an end to the administrative process. The time has come for this Court to direct the Commission to do what it is supposed to do.

### CONCLUSION

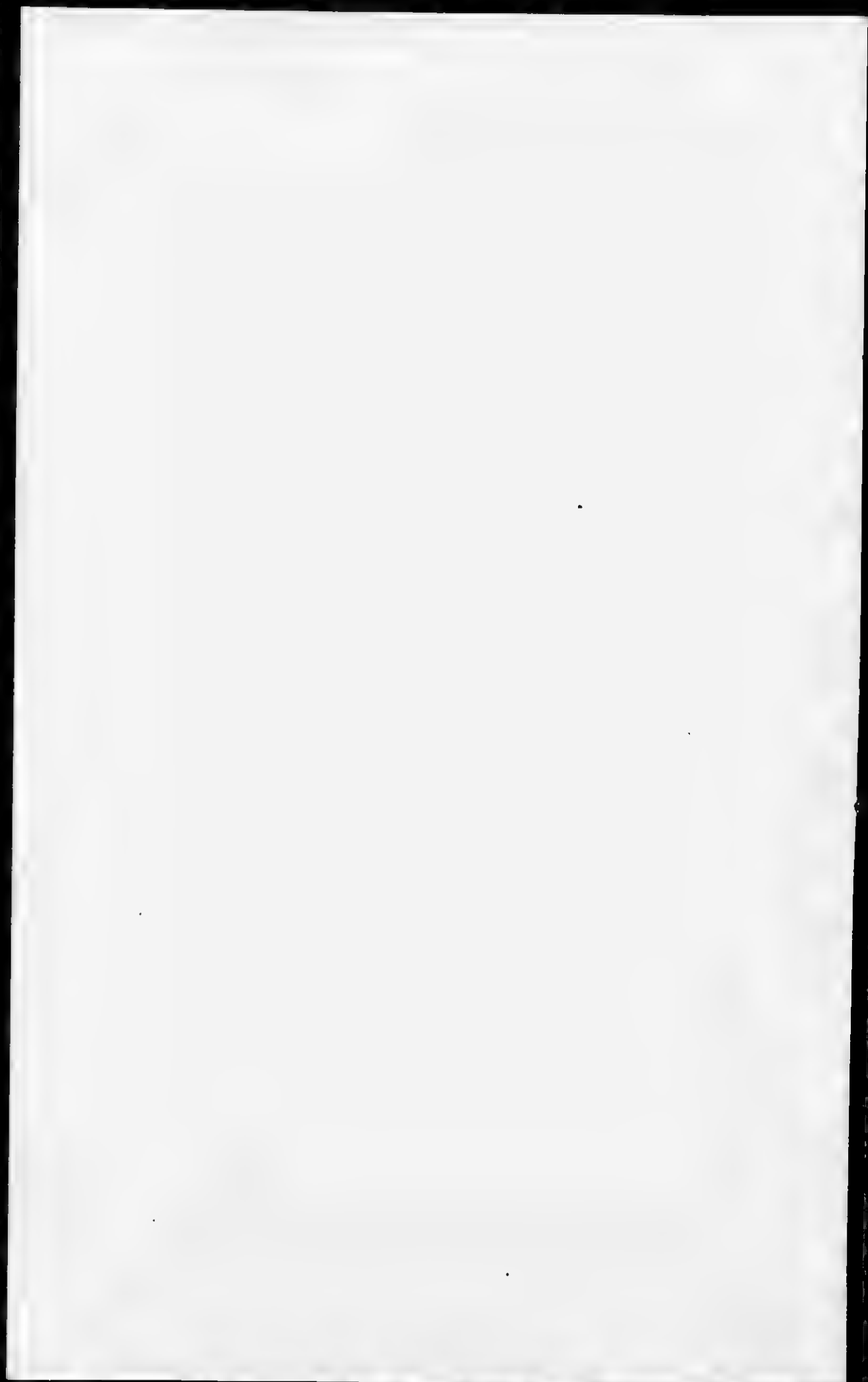
The issue in the case is simple, once all the technical verbiage is cleared away. WAIT Radio stands ready and able to supply a new radio voice to over 4,400,000 people in the Chicago area. This additional service can be supplied without taking radio service away from anyone else. The Commission's refusal to grant WAIT's request is simply inconsistent with the statutory mandate and the Constitu-

tion. In such circumstances it is proper for this Court to vacate the orders entered below and to direct the Commission to waive any rules which bar the request, accept the application for filing, and grant the requested application.

Respectfully submitted,

Ramsey Clark  
Kenneth C. Bass, III  
PAUL, WEISS, GOLDBERG,  
RIFKIND, WHARTON & GARRISON  
1775 K Street, N.W.  
Washington, D.C. 20006  
*Attorneys for Appellant*

January 11, 1971.



## TECHNICAL APPENDIX

It may be helpful to sketch briefly a few points about the nature of broadcasting, points which are well known in the industry:

A standard non-directional radio transmitter will usually radiate equally in all directions from the transmitter, and thus will serve a circular area.

The basic radio wave utilized in broadcasting follows the contours of the earth's surface and is known as the "groundwave." For present purposes, there are two essential points about the groundwave: first, it provides a steady, stable, non-fading signal; second, it is limited as to the distance it can reach. It involves essentially a local broadcasting operation. Signals provided by groundwaves are called "primary" service.

There is another type of radio wave which has distinctive characteristics very different from those of the groundwave. It does not follow the curvature of the earth but radiates upward into the atmosphere. In the daytime, because of the sun, it is absorbed by the atmosphere; but at night it is reflected off layers high in the atmosphere in mirror-like fashion and bounces back to the earth's surfaces over great distances away from the original source of the transmission. It is called the "skywave," and for our purposes there are three points to emphasize about it. First, no additional or special equipment is used to transmit a skywave; it is generated simultaneously with the generation of the groundwave and in a sense is a by-product of it. Second, it is capable of reaching relatively great distances. Third, it is by nature an erratic and uncertain signal which always fades in and out and becomes distorted or unintelligible. Skywaves are referred to as the "secondary" service. The power of stations generally ranges from 1,000 to 50,000 watts, and the reach of the station varies with its power. By and large, all power does is add distance to the groundwave; thus the radius will vary roughly from 60 miles for a 1,000 watt transmitter to 160 miles for a 50,000 watt transmitter.

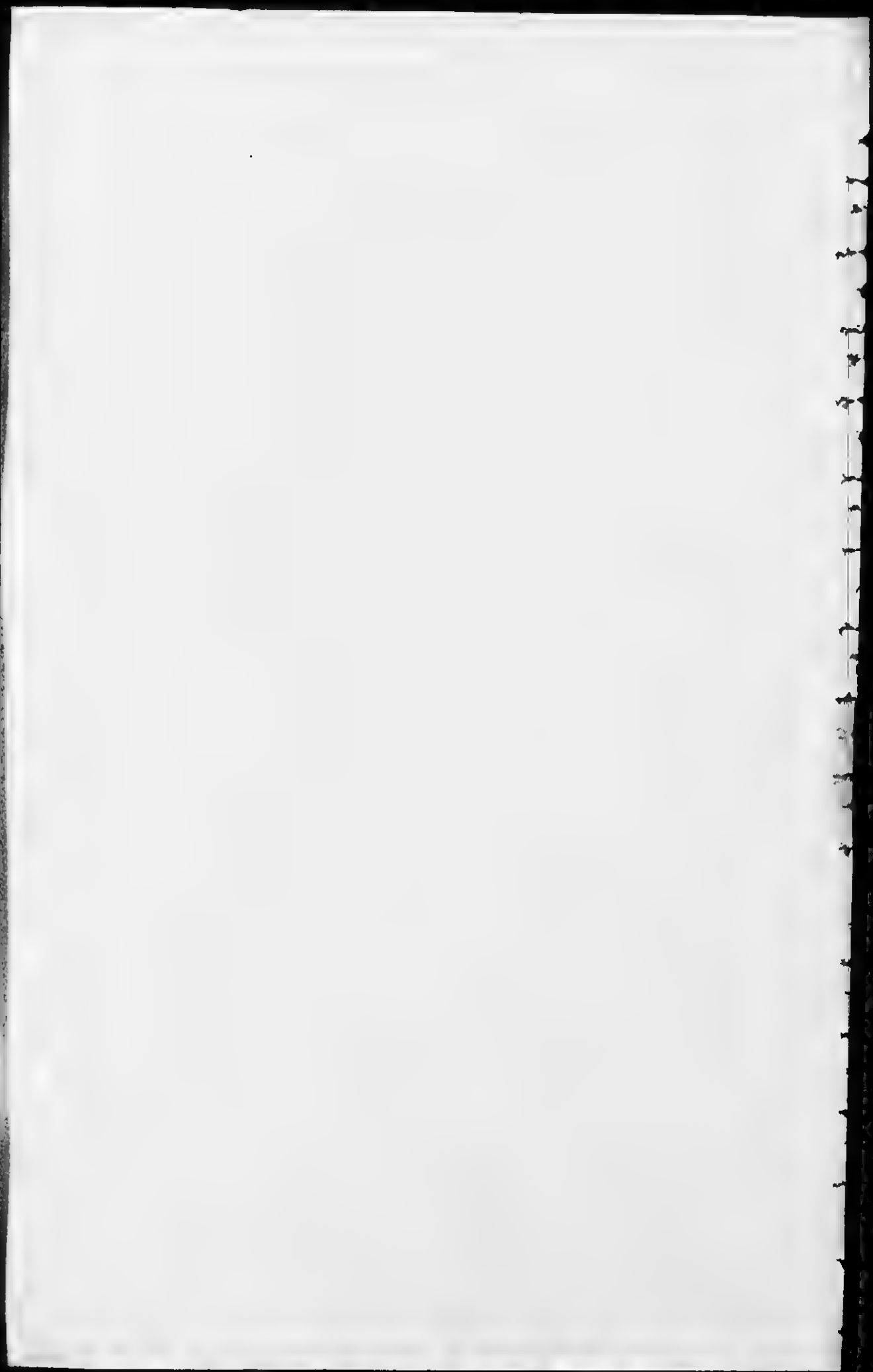


Years ago, the Commission confronted the problem of supplying radio services to the sparsely populated mountain and desert areas of the country. There is no way of accomplishing this by groundwave without government-owned or subsidized radio because the population of these areas cannot support local stations. The Commission, therefore, decided upon a strategy of exploiting the skywave or "secondary" service to solve the problem, because the skywave could travel the necessary distances. There was no way that the Commission could cure the intrinsically erratic and fading quality of the skywave signal because these are its inherent weaknesses as a result of radio physics. However, the Commission could rid the skywave of interference from other stations by silencing them at night, thus maximizing the utility of certain skywaves. This involved a deliberate policy choice to sacrifice the groundwave of the silenced stations at night (and thereby sacrifice an additional primary service to populated areas) in order to minimize skywave interference for the stations not silenced at night and thereby add skywave service to underpopulated regions. In brief, the policy was one of providing an "inadvertent public service" to the remote regions from stations whose "contribution" was that they were allowed to broadcast a skywave at night protected from interference. Because the Commission's action served to clear certain channels of potentially interfering broadcasts at night, these designated frequencies became known as "clear channels"; and this general policy of exploiting skywaves became known as the "clear channel policy." The policy is expressed in *Matter of Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 565 (1961). The areas which had no local groundwave service and were served only by skywaves at night became known as "white areas." The Commission has never expressed any reason for silencing at night stations on the clear channel frequencies other than to permit the skywave service to flow interference-free to the white areas.

It should be emphasized that the selection of stations as clear channels—that is, the stations to perform the inadvertent “public service” of providing skywaves to white areas—has been essentially a random matter determined largely by priority in time in getting licensed on a given frequency. Any one of a number of stations would have served as well had they been allowed to operate at night and had other stations been silenced to protect their skywaves. The purpose of the clear channel policy thus has not been to create a few strong and paramount facilities on certain prime radio frequencies as entities desirable in and of themselves, nor has the purpose been to discipline the industry by silencing some stations at night. The purpose, as stated by the Commission, is simply to insure unimpaired skywave service to “white areas.”

Since the quality of a radio signal varies with the distance it travels, the industry and the Commission have devised measures of signal strength. The basic measure is the millivolt per meter (mv/m), a notion somewhat analogous to the concept of voltage used in connection with storage batteries and everyday electrical appliances. For example, the Commission will not license a city station unless it can furnish a signal strength of 25.0 mv/m to the principal business district and 5.0 mv/m to city residential areas. In the case of skywaves, the measure is combined with a percentage figure for the stability of the signal, one of whose properties is fading out and easy distortion. By engineering convention, the outer limit of a usable signal is one with an intensity of 0.5 millivolt per meter received 50% of the time. This measure is normally written as “0.5 mv/m-50%.” The 50% means here, for example, that with a signal of this quality if a joke is being told in the broadcast, the listener has a fifty-fifty chance of missing the punch line because of the fading out or distortion of the signal. It is customary to speak of the 0.5 mv/m-50% nighttime skywave contour of a given station, meaning the point beyond which the station’s skywave no longer produces a signal of any broadcast value.

While the normal broadcast pattern of a typical non-directional station is circular (or shaped like a whole pie) radiating out from the transmitter at the center, this can be altered by changes in antenna design. The use of directionalized antenna from multiple towers can reduce the whole pie into single slices or wedges virtually in any direction desired. It serves to concentrate the full radio transmission patterns of other stations, *e.g.*, if two adjoining circular radiation patterns would overlap thus producing interference, this interference can be eliminated if one pattern is reduced from a whole circle to an arc or segment.



BRIEF FOR APPELLEE

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,762

---

WAIT RADIO, a co-partnership,  
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee,

MIDWEST RADIO-TELEVISION, INC.,  
CARTER PUBLICATIONS, INC.,  
CLEAR CHANNEL BROADCASTING SERVICE,  
Intervenors.

---

ON APPEAL FROM ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

---

RICHARD E. WILEY,  
General Counsel,

JOHN H. CONLIN,  
Associate General Counsel,

STUART F. FELDSTEIN,  
CHARLES M. FIRESTONE,  
Counsel.

Federal Communications Commission  
Washington, D. C. 20554

United States Court of Appeals  
for the District of Columbia Circuit

FILED MAR 24 1971

*Nathan J. Paulson*  
Clerk



## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUE PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	14
I. THE COMMISSION DID NOT ABUSE ITS DISCRETION BY HOLDING THAT WAIT RADIO FAILED TO ESTABLISH THAT WAIVER OF IMPORTANT A'LOCA- TIONS RULES WOULD SERVE THE PUBLIC INTEREST.	14
A. WAIT's Application Undermines The Policy Behind The Commission's Clear Channel Rules.	17
B. The WAIT Application Undermines The Policy Behind The Commission's "Unserved" Area Or Population Rule.	26
C. The Commission Did Not Abuse Its Discretion In Finding That A Conditional Waiver Of The Rules Would Not Serve The Public Interest.	34
II. REFUSAL TO GRANT WAIT'S WAIVER REQUEST IS NOT AN ABRIDGMENT OF THE FIRST AMEND- MENT RIGHTS OF WAIT OR ITS LISTENERS.	38
CONCLUSION	43



# TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Borrow v. F.C.C.</u> , 109 U.S. App. D.C. 224, 285 F.2d 666, <u>cert. denied</u> , 364 U.S. 892 (1960).	35
<u>Buckley-Jaeger Broadcasting Corp. v. F.C.C.</u> , 130 U.S. App. D.C. 90, 397 F.2d 651 (1968).	14, 22
<u>Carter Mountain Transmission Co. v. F.C.C.</u> , 116 U.S. App. D.C. 93, 321 F.2d 359, <u>cert. denied</u> , 385 U.S. 951 (1963).	39
<u>Cornell University v. United States</u> , 427 F.2d 680 (2d Cir. 1970).	22
* <u>560 Broadcast Corp. v. F.C.C.</u> , 135 U.S. App. D.C. 330, 418 F.2d 1166 (1969).	14, 22, 30
<u>Guinan v. F.C.C.</u> , 111 U.S. App. D.C. 371, 297 F.2d 782 (1961).	28
<u>Industrial Broadcasting Co. v. F.C.C.</u> , D.C. Cir. Case No. 23,856, decided December 16, 1970.	22
<u>Interstate Broadcasting Co. v. F.C.C.</u> , 116 U.S. App. D.C. 327, 323 F.2d 797 (1963).	32
<u>James S. Rivers (WJAZ) v. F.C.C.</u> , 122 U.S. App. D.C. 29, 351 F.2d 194 (1965).	14, 22
<u>Lafayette Radio Electronics Corp. v. United States</u> , 345 F.2d 278 (2d Cir. 1965).	39
<u>National Broadcasting Co. v. F.C.C.</u> , 124 U.S. App. D.C. 116, 362 F.2d 946 (1966).	18
* <u>National Broadcasting Co. v. United States</u> , 319 U.S. 190 (1943).	15, 39, 41
<u>Office of Communication of the United Church of Christ v. F.C.C.</u> , 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).	14, 35

## Cases:

* <u>Red Lion Broadcasting Co. v. F.C.C.</u> , 395 U.S. 367 (1969).	15, 39
<u>Sayger v. F.C.C.</u> , 114 U.S. App. D.C. 112, 312 F.2d 352 (1962).	28
<u>Sunshine State Broadcasting Company, Inc. (WBRO) v. F.C.C.</u> , 114 U.S. App. D.C. 271, 314 F.2d 276 (1963).	28
* <u>The Goodwill Stations, Inc. v. F.C.C.</u> , 117 U.S. App. D.C. 64, 325 F.2d 637 (1963).	3, 18, 23
* <u>WAIT Radio v. F.C.C.</u> , 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969).	1, 4, 15, 16, 17, 34
<u>WBEN, Inc. v. F.C.C.</u> , 396 F.2d 601 (2d Cir.), cert. denied, 393 U.S. 914 (1968).	3, 39
<u>Williams v. F.C.C.</u> , 120 U.S. App. D.C. 385, 347 F.2d 479 (1965).	22, 28

## Administrative Decisions:

<u>Capitol Broadcasting Corp. (WKEN)</u> , 6 F.C.C. 2d 446 (1967).	42
<u>Mel-Lin, Inc.</u> , 22 F.C.C. 2d 165, 18 Pike & Fischer, R.R. 2d 787 (1970), reconsideration denied, 26 F.C.C. 2d 908, 20 Pike & Fischer, R.R. 2d 767 (1970).	22
<u>Semrow Broadcasting Co.</u> , 7 Pike & Fischer, R.R. 2d 645 (1966).	22

## Statutes:

Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151 through 609:

Section 303	17
Section 307(b)	17, 20
Section 309(e)	17, 20
Section 402	2

	<u>Page</u>
<u>Rules and Regulations of the Federal Communications Commission, 47 CFR (1970):</u>	
Section 73.21	3, 6, 27, 34
Section 73.22	10, 23, 24, 26 27, 28, 31, 34 37
Section 73.24(b) (3)	3, 9, 11, 12 16, 26, 27, 28 34, 42
Section 73.24(i)	28
Section 73.25	3, 6, 16, 18, 20, 34
Section 73.182	3, 7, 20, 34

Other Authorities:

<u>AM Station Assignment Standards, 25 Pike &amp; Fischer, R.R. 1615 (1963) (Notice of Proposed Rule Making).</u>	18, 26, 29
* <u>AM Station Assignment Standards, 24 F.R. 9492, 2 Pike &amp; Fischer, R.R. 2d 1650 (1964) (Report and Order).</u>	29, 30
* <u>Clear Channel Broadcasting, in the Standard Broadcast Band, 31 FCC 565 (1961), reconsideration denied, 24 Pike &amp; Fischer, R.R. 1595 (1962).</u>	3, 18, 19, 23, 24, 31
<u>Nighttime Requirements for Standard Broadcast Station Assignments, 33 F.R. 4186 (1968).</u>	28
<u>Second Report and Order (CATV), Docket No. 14895, 2 F.C.C. 2d 725 (1966).</u>	36

\*Cases and other authorities principally relied upon are marked with an asterisk.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,762

---

WAIT RADIO, a co-partnership,  
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee,

MIDWEST RADIO-TELEVISION, INC.,  
CARTER PUBLICATIONS, INC.,  
CLEAR CHANNEL BROADCASTING SERVICE,  
Intervenors.

---

ON APPEAL FROM ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

---

BRIEF FOR APPELLEE

---

STATEMENT OF THE ISSUE PRESENTED \*

Whether the Commission abused its discretion or violated the First Amendment when it held that the appellant's application for authorization to broadcast during nighttime hours, which concededly violated important Commission allocation rules, failed to set forth adequate grounds for waiver of those rules.

---

\* This case was before this Court on prior appeal (Case No. 21,689) and reported as WAIT Radio v. F.C.C., 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969).

COUNTERSTATEMENT OF THE CASE

This is an appeal taken under Section 402(b) of the Communications Act from the Commission's action of May 6, 1970, 22 F.C.C. 2d 934 (J.A. 291), denying a request for waiver of certain allocation rules and returning as unacceptable for filing the standard broadcast application for nighttime operation submitted by WAIT Radio, and the Commission's order of September 30, 1970, 25 F.C.C. 2d 1016 (J.A. 319), denying reconsideration. A counterstatement is necessitated in this case by WAIT's incomplete recitation of the facts and what we believe to be its misreading of the Commission's decision.

Appellant WAIT radio is a Class II-D standard (AM) broadcast station licensed to operate with 5000 watts power on 820 kHz<sup>1/</sup> in the Chicago area. Since 820 kHz is a Class I-A clear channel, only one station, WBAP, Fort Worth, Texas,<sup>2/</sup> is authorized to operate on this channel at night in all of North America. 47 CFR 73.25. Accordingly, WAIT possesses a daytime-only

---

<sup>1/</sup> KHz, meaning kilohertz, is synonymous with kc/s, kilocycles per second.

<sup>2/</sup> The channel was operated at night on a share-time basis by WBAP and WFAA, both of Fort Worth/Dallas, but on April 22, 1970, the Commission authorized WBAP, licensed to intervenor Carter Publications, to operate fulltime on 820 kHz, and WFAA, licensed to A. H. Belo Corp., to broadcast fulltime on 570 kHz. (J.A. 292, n. 6).

<sup>3/</sup>  
authorization.

WAIT tendered an application with the Commission on March 7, 1967, requesting authorization to operate fulltime on 820 kHz with 10,000 watts power using a directional antenna system. Because the application was in violation of Sections 73.21, 73.24(b)(3), 73.25, and 73.182 of the Commission's rules, 47 CFR 73.21, 73.24(b)(3), 73.25, 73.182, WAIT also petitioned the Commission to waive these rules (A. 72). Sections 73.21, 73.25, and 73.182 are the Commission's clear channel rules and technical specifications.<sup>4/</sup> Section 73.24(b)(3) provides that applications for nighttime facilities will not be accepted (i) if objectionable interference would result to an existing station or (ii) if the proposed operation would not provide a first primary service to at least

<sup>3/</sup> During daytime hours, only the groundwave signals of AM stations are of consequence, because that part of a station's signal which is directed upward (the skywave signal) is dissipated and lost. However, at night the skywave signals are reflected back to earth by the ionosphere, beyond the useful reach of the groundwave signal and often at great distances from the originating station. Because of the additional interference which this phenomenon causes, the number of stations which can operate at night is sharply reduced. In fact, about half of the total number of some 4200 AM stations are daytime-only stations. See WBEN, Inc. v. F.C.C., 396 F.2d 601 (2d Cir.), cert. denied, 393 U.S. 914 (1968); The Goodwill Stations, Inc. v. F.C.C., 117 U.S. App. D.C. 64, 325 F.2d 637 (1963).

<sup>4/</sup> Sections 73.25(a) and 73.182(a)(1)(i) prohibit any "duplication" on 820 kHz. This was one of 12 clear channels which were not "duplicated" in 1961 in order to preserve the potential for widespread improvement in skywave service, and to serve vast regions of the West with low population density where these skywave signals would be the only nighttime broadcast service. Clear Channel Broadcasting, 31 F.C.C. 565, 576 (1961), reconsideration denied 24 Pike & Fischer, R.R. 1595 (1962).

25 percent of the area or population within the proposed interference-free service area.<sup>5/</sup>

WAIT based its waiver request on its allegedly unique programming, the contention that objectionable interference which would be caused by the proposed operation would not occur in any white areas and that applying the rules to WAIT, in this instance, constituted regulatory overbreadth proscribed by the First Amendment. The Commission found these arguments unpersuasive, refused to waive the rules, and accordingly returned WAIT's application as unacceptable for filing, 10 F.C.C. 2d 481 (1967) (J.A. 130), reconsideration denied 11 F.C.C. 2d 547 (1968) (J.A. 184).

On appeal, this Court, Judge Danaher dissenting, remanded the case to the Commission on the grounds that the WAIT application was not given reflective consideration or the "hard look" which it merited. Accordingly, the Court refrained from ruling on substantive contentions at that time. WAIT Radio v. F.C.C., 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) (J.A. 189).

---

<sup>5/</sup> Areas without a primary service are called "white" or "unserved" areas.



WAIT then petitioned the Commission for specification of the issues and for oral presentation. On grounds that WAIT itself would be best able to arrive at the arguments which make its case exceptional and meritorious of waiver of the rules, the Commission denied the request for specification of the issues, but did allow WAIT to submit new data and scheduled the matter for oral argument (J.A. 224-227). Oral argument was heard from WAIT and intervenors Carter Publications, Inc. (WBAP), Midwest Radio Television, Inc., (licensee of station WCCO, Minneapolis, which claims that adjacent channel interference would result from the proposed operation), and Clear Channel Broadcasting Services (a trade organization of independent clear channel licensees).<sup>6/</sup>

WAIT submitted new evidence to support its old claim that although its proposal would interfere with reception of clear channel WBAP by more than 2 million people in an area of over 70,000 square miles, there is no "white area" within this WBAP-WAIT interference area.<sup>7/</sup> See Engineering Statement of

---

<sup>6/</sup> Also included was A. H. Belo Corp., licensee of WFAA, but in view of its fulltime assignment to 570 kHz, Belo does not intervene here. See supra, n. 2.

<sup>7/</sup> The station also submitted new evidence that no one in the interference area listened to WBAP, but this was contested by evidence submitted by the other parties. The Commission did not base its holding on the contentions of either party on this issue since basic allocations decisions are usually made without the use of audience ratings. (J.A. 320).

Walter F. Kean (J.A. 234). The station reiterated the claims that its program format merited a public interest finding in favor of the waiver request, that Section 73.24(b)(3) does not apply to its proposal, that interference to adjacent channels which does not constitute objectionable interference under Commission rules should not be considered, and that denial of its proposal would constitute "overbreadth" regulation.

The Commission rejected WAIT's petition on the grounds that the station did not meet its burden of showing that a waiver would be in the public interest. The Commission carefully and precisely examined each of WAIT's contentions and found that a waiver in this case would cause interference to clear channel WBAP and to adjacent channels WCCO and WGY without overriding public interest considerations, that WAIT's programming was not unique, that no white or "unserved" area would be served, and that the proposal would generally undermine rather than serve the basic policies underlying the clear channel and "white area" rules which the station sought to have waived. (J.A. 291-300).

Specifically, the Commission answered WAIT's claim for waiver of the clear channel rules, 47 CFR 73.21, 73.25, and

73.182, by explaining that WAIT does not attack the rules themselves; that what "the applicant, in effect, is saying, is that although it will not promote our policies, it will also not infringe upon them," (J.A. 294); that this negative argument, i.e., failure to hinder a policy, is not sufficient to waive important allocations rules; and that even if it were grounds, WAIT's particular proposal would, in fact, undermine rather than support the policies behind these rules. Thus, the Commission explained that (J.A. 294):

If clear channels are going to be duplicated, and duplicated according to our rules on a systematic and controlled basis, \*/ then most assuredly the public interest will not be served by authorizing another nighttime station in Chicago. In fact, in so doing, we would be preventing possible eradication of "unserved" area in other states.

\*/ As the Commission concluded in the Clear Channel case, to serve the public interest, a breakdown of the clear channels must be on a carefully controlled basis, one which gives a measure of protection to skywave service on the channel and which assures that new service will be located in presently underserved areas and not in metropolitan centers already receiving a large number of signals. See Section 73.22(a) which assigns those clear channel frequencies which have been "broken down" to such States as Utah, Wyoming, New Mexico, et al.

To this end the Commission noted that a rule making proposal submitted by Station WDAE, Ellsworth, Maine, is now pending to allow nighttime duplication on 820 kHz. This proposal would encompass white areas in over 50 percent of the station's interference-free area which also contains over 25 percent of the population to be served (J.A. 294-295). A grant of WAIT's application would substantially reduce the white area WDAE would serve, illustrating the rationale behind the Commission's desire for allocation on a controlled basis. (J.A. 295).

The Commission then addressed itself to the interference problem, stating (J.A. 296):

In addition to the interference caused within [WBAP's] secondary service area, a grant of WAIT's proposal would also cause interference, both beyond [WBAP's] nighttime 0.5 mv/m--50 percent skywave contour, and well within the secondary service area of WCCO, a Class I-A station on adjacent clear channel 830 kc, and WGY, a Class I-B station on adjacent channel 810 kc.

In answer to WAIT's argument that only the interference caused within WBAP's 0.5 mv/m--50 percent skywave contour is objectionable under the rules, the Commission explained (J.A. 296):

When an applicant requests a waiver of the rules, which have been promulgated in the public interest, all factors become relevant to that interest. Almost all new allocations for AM stations will cause some interference not recognized as objectionable under our rules. This does not mean, however, that the Commission considers it desirable to permit such interference. It only means that we have sacrificed optimum broadcast standards in order to serve other aspects of the public interest. This has been evidenced in our preference for proposals which would be first local outlets or which would serve a substantial amount of area which was without nighttime primary standard broadcast service. In virtually all of these allocations, some interference, not objectionable under our rules, yet ideally undesirable, is allowed in order to serve the public interest. However, the Commission has recently refused to waive its rules to accept applications for nighttime facilities which would not serve 25 percent "unserved" area or population or provide other overriding public benefits.

While recognizing that there is no congestion problem on 820 kHz at this time, the Commission considered the large areas that would lose reception of WCCO and WGY, concluding that this "loss of service" is not warranted in order to provide Chicago with a 26th nighttime service ( J.A. 297).

As to WAIT's claim that it is exempt from Section 73.24(b)(3) of the rules, the 25 percent "unserved" area or population rule, the Commission explained that WAIT is not a Class II-A station (the only class exempted) and even if it

were, it would be subject to the same requirements under Section 73.22 (J.A. 297). The Commission then found that WAIT's engineering showing did not justify waiver of the rules. The interference which WAIT's proposal would cause, some of which is recognized as "objectionable" under the rules, as well as the general degradation of service in the AM band which would result from substantial additional nighttime assignments, was not justified by a proposal to provide the Chicago area with its 26th nighttime broadcast service.

Moreover, the Commission did not consider WAIT's programming as unique.<sup>8/</sup> Even if it were, the Commission explained, programming format alone "is usually not given particular consideration in reviewing allocation requests" (J.A. 294), and "' . . . greatest weight must be given to the enduring allocation characteristics of a proposal rather than to the generally transitory programming to be carried out.'" (J.A. 300).

---

<sup>8/</sup> WAIT's proposal in this regard consists of semi-classical and Broadway music (J.A. 290). This format is already carried on at least four other Chicago area stations at night (J.A. 299, n. 26).

Finally, the Commission rejected WAIT's contention that a denial of its waiver request constitutes overbreadth of regulation in violation of the First Amendment. Because rejection of the application was reasonable and consistent with the public interest standard of the Communications Act, the Commission found that its action was valid within the meaning of the First Amendment. The Commission discussed this contention from the point of view of both the clear channel and nighttime allocations policies (J.A. 298-299). Accordingly, the Commission refused to waive the rules in question and returned WAIT's application.

Interpreting the Commission's decision as primarily concerned about future flexibility in allocations, WAIT petitioned for reconsideration, offering to condition the waiver upon a future order of the Commission breaking down 820 kHz as a clear channel. The Commission denied reconsideration (J.A. 319), however, pointing out that in addition to its concern for future allocations, the "unserved" area or population rule, 47 CFR 73.24(b)(3), and the interference which would be caused to WBAP and adjacent channels were relevant considerations in determining what was in the public interest (J.A. 320-321). The Commission noted that WAIT's arguments regarding



Section 73.24(b) (3) were aimed at the wisdom of preserving the rule rather than waiving its applicability, and that the proper forum for such contentions is in the broad context of a rule making proceeding ( J.A. 321). As for conditioning a waiver on future allocation action on the 820 kHz frequency, the Commission found that WAIT not only misconstrued its burden before the Commission in obtaining a waiver, but also the reasons for the Commission's refusal to waive the rules. As the Commission explained (J.A. 322):

It is not so much the precedential impropriety of granting a conditional waiver which is of major concern to this Commission; but rather, the almost unimaginable consequences of doing so without a concomitant showing that such action is in the public interest. \* \* \* In our last decision, we found that WAIT's proposal would in no way promote the policies underlying our rules, because WAIT's proposed nighttime operation, in addition to causing interference to the existing service of three stations, would not be unique or serve unserved areas or population. We found, therefore, that waiver of our rules to permit the addition of still another ordinary nighttime service to the multiplicity of such services already available in the Chicago area would not be in the public interest. WAIT's offer to accept a conditional grant does not go to these public interest findings, but only to the narrower reasoning which it erroneously ascribes to the Commission. \*/

\*/ We note that making a conditional grant to permit establishment of a new service which may later be withdrawn is not without difficulty. As we said in our Second Report and Order (CATV) in Docket No. 14895, etc., 2 F.C.C. 2d 725, 782, "once entrenched, it is difficult, if not wholly impracticable in the light of the disruption [to the public] which would result, to take effective action or to attempt to roll back the situation . . ."

The Commission reaffirmed its position that its allocation policies are not overly broad in derogation of the First Amendment. Although WAIT's recitation of the overbreadth concept in First Amendment analysis was not challenged in the abstract, the Commission found that when viewed in the concrete terms of maintaining a rational system of allocations, free speech is not abridged by prohibiting many AM stations from operating at night, and WAIT's circumstances do not warrant an exception to this policy (J.A. 322-323).<sup>9/</sup>

---

<sup>9/</sup> After its statement of the case WAIT has placed a so-called "Statement of Agreed Facts" (Br. 6-8). The Commission has never entered into any agreement of this sort and this enumeration is merely a one-sided recapitulation of the points which WAIT feels are most favorable to its case. Furthermore, the "two other important points" of alleged agreement (Br. 7-8) are not that at all. As the record citations provided by WAIT show, they were not determinations by the agency but a mere recitation of WAIT's contentions.

ARGUMENT

- I. THE COMMISSION DID NOT ABUSE ITS DISCRETION BY HOLDING THAT WAIT RADIO FAILED TO ESTABLISH THAT WAIVER OF IMPORTANT ALLOCATIONS RULES WOULD SERVE THE PUBLIC INTEREST.

It is well-settled that whether the Commission's rules should be waived is a matter in which the agency has broad discretion, especially where the controversy concerns the Commission's engineering allocations rules. E.g., 560 Broadcast Corp. v. F.C.C., 135 U.S. App. D.C. 330, 418 F.2d 1166 (1969); Buckley-Jaeger Broadcasting Corp. v. F.C.C., 130 U.S. App. D.C. 90, 94, 397 F.2d 651, 655 (1968); James S. Rivers (WJAZ) v. F.C.C., 122 U.S. App. D.C. 29, 31, 351 F.2d 194, 196 (1965), and cases cited therein. The Commission's discretion is, of course, always limited by the First Amendment, which is intimately connected to the broadcast media. And the Commission must make an affirmative finding that its action is consistent with the public interest, convenience or necessity. 47 U.S.C. 309(e). Cf. Office of Communication of the United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 342, 359 F.2d 994, 1008 (1966). But when an application for a broadcast license violates on its face a set of Commission

rules, it is the applicant's burden to demonstrate that waiver<sup>10/</sup> of those rules is in the public interest. As this Court stated on the prior appeal in this case, WAIT Radio v. F.C.C., supra, 135 U.S. App. D.C. at 321, 418 F.2d at 1157 (J.A. 194):

Presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule. An applicant for waiver faces a high hurdle even at the starting gate.

Elsewhere, this Court has explained that the Commission should not be required "to write, as it were, on a tabula rasa in implementing its clear channel decision. It does not have to remain oblivious to all that has gone before or ignore its own earlier actions and the evidence which justified those actions." National Broadcasting Co. v. F.C.C., 124 U.S. App. D.C. 116, 125, 362 F.2d 946, 955 (1966) (footnote omitted).

<sup>10/</sup> While the First Amendment does apply to broadcasting, it must be kept in mind that because radio is inherently not available to all, a valid denial of a license under the Communications Act is not an abridgment of free speech. National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943). See also Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 388 (1969). Thus, while the First Amendment is related to every broadcast action with which the Commission deals, it does not, as WAIT would have it, place the burden on the Commission to demonstrate that refusal to waive its own rules is in the "public interest."

In remanding the instant case this Court directed the Commission to give the merits of WAIT's proposal a "hard look" and "... state its basis for decision with greater care and clarity." WAIT Radio v. F.C.C., supra, 135 U.S. App. D.C. at 320, 418 F.2d at 1156 (J.A. 192). The Commission has complied with the Court's directive. The two opinions now under review contain a comprehensive analysis and discussion of WAIT's proposal and contentions. The "hard look" requested by this Court has been given; WAIT's proposal has still been found wanting.

WAIT's proposal directly conflicts with two rather basic Commission allocations policies: it does not comply with the standards governing applications for nighttime service (the objectionable interference and the 25 percent "unserved" area or population rules of Section 73.24(b)(3)), and it violates the clear channel rules governing the use of 820 kHz (a Class I-A clear channel under Section 73.25). WAIT accepts the rules and the fact that its proposal does not comply with them. Therefore, in requesting a waiver of these rules, WAIT has the burden of demonstrating that a grant of the waivers will result in furthering, not undermining, the policies behind

the rules. See WAIT Radio v. F.C.C., supra, 135 U.S. App. D.C. at 321, 418 F.2d at 1157. WAIT's argument that its application has a public interest presumption going for it because it will bring a new service to some people (Br. 10) simply begs the question. All applications propose to serve some people, but the Commission is charged with the responsibility of allocating stations and frequencies on an efficient and equitable basis under Section 307(b), and Section 309(e) directs the Commission to <sup>11/</sup> grant applications only when they are in the public interest. In this case WAIT simply did not meet its public interest burden of showing that waiver of the above important allocations rules is warranted in order to provide Chicago with its 26th nighttime service.

A. WAIT's Application Undermines The Policy Behind The Commission's Clear Channel Rules.

WAIT Radio is licensed to operate on 820 kHz. As explained above, this is a clear channel, and only Class I-A station WBAP of Fort Worth, Texas, is authorized to operate

<sup>11/</sup> Contrary to WAIT's strained interpretation (Br. 10, n. 7), Section 309(e) does not establish a presumption that applications providing a new service are normally in the public interest. That section is procedural rather than substantive, and does not purport to modify the requirements of Sections 303 and 307(b) and the rules promulgated thereunder.

on this frequency at night. 47 CFR 73.25(a). The clear channel policy is part of the overall nighttime allocation pattern aimed at maximizing the number of listeners who can benefit from skywave service and at the same time providing the widest possible program choice.<sup>12/</sup>

The Commission adopted the present clear channel pattern in 1961, when, after 16 years of study, it chose 13 of the then 25 clear frequencies to be "duplicated," i.e., have more than one station operate on the channel at night. Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565 (1961), reconsideration denied, 24 Pike & Fischer, R.R. 1595 (1962), affirmed, The Goodwill Stations, Inc. v. F.C.C., 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). See also National Broadcasting Co. v. F.C.C., 124 U.S. App. D.C. 116, 362 F.2d 946 (1966). At the same time the Commission refrained from

---

<sup>12/</sup> The Commission's allocations goals have traditionally been to provide (a) some service of satisfactory signal strength to all areas of the country, (b) as many program choices to as many listeners as possible, and (c) service of local origin to as many communities as possible. In 1963 the Commission made clear that ahead of all of these goals is the objective of preserving existing service areas especially against general degradation of service by numerous additional grants which, while individually of negligible interference, in the aggregate cause congestion in the AM band. See AM Station Assignment Standards, 25 Pike & Fischer, R.R. 1615, 1626 (1963).



action on the other twelve clear channels, thus leaving them unduplicated, and deferred action on a proposal to allow some clear channels to operate at "super power" of up to 750 kw. Each frequency being considered was given individual attention because of the importance of the issue and the particular factors pertaining to it. With specific regard to the nonduplication of the channel here in question, 820 kHz, the Commission stated, Clear Channel Broadcasting, supra, 31 F.C.C. at 576-577:

In selecting 640, 820, 1160 and 1200 kc for inclusion in this group, we have noted that these are the only I-A channels (other than 1040 and 1120 kc discussed below) serving the West; that the West is characterized by vast regions of low population density where skywave signals afford the only nighttime broadcast service; that a choice among skywave signals is not generally available to a substantial part of the West; and that acceptable locations for assignment of new unlimited-time stations on these channels would, in general, be limited to eastern areas already receiving abundant service. Accordingly, at this stage, we preserve the potential for improving skywave service which these channels afford.

For these reasons, then, the Commission made the policy decision to refrain from duplicating service on 820 kHz.

By seeking a waiver WAIT is in fact attempting to alter this policy entirely as it affects one of the twelve remaining clear channels. WAIT has not sought rule making to duplicate 820 kHz and advances no reasons why the policy to maintain 820 kHz as a clear channel is served by its application. Yet this question must be answered before the Commission can make a determination under Sections 307(b) and 309(e) of the Communications Act as to whether WAIT's nighttime operation on the channel would serve the public interest.

In rejecting WAIT's request, the Commission was not able to find that WAIT's proposal justifies breaking down 820 kHz. On the contrary, the proposal would, inter alia, seriously hamper the Commission in future allocations regarding nighttime broadcasting on that frequency, or in authorizing clear channels with "super power" (J.A. 395). It would also interfere with the co-channel signals of clear channel WBAP, and adjacent channel stations WCCO, on 830 kHz, and WGY on 810 kHz (J.A. 296).

As grounds for a waiver WAIT argues that it would not interfere with the 0.5 mv/m--50 percent skywave contour <sup>13/</sup>

---

<sup>13/</sup> This is the area which can receive the WBAP signal of 0.5 mv/m strength for 50 percent of the time. WAIT applies this standard, from 47 CFR 73.182(a), even though under the rules WBAP is protected from any nighttime interference on 820 kHz. 47 CFR 73.25(a).

of WBAP in any area which does not receive at least two other nighttime signals, thus the policy behind the clear channel rules would not be infringed. The Commission stated that even if this were true, the mere failure to hinder a policy does not by itself constitute sufficient reason to grant a waiver.

(J.A. 294). WAIT's negative argument, however, not only fails to serve the objectives of the rules which are to provide at least some service of satisfactory strength to all areas of the country, but it would also "undercut the Commission's rules" (J.A. 294). To take away a third or fourth primary signal from millions of people (J.A. 294) in order to provide Chicago with still another (26th) nighttime broadcast service would not meet the rule's objectives, and WAIT has shown no counterbalancing unique factors present in its application. WAIT's only justification, its programming, was not found to be unique.<sup>14/</sup> Even assuming that WAIT's program format were unique, the Commission does not usually consider such transitory

---

<sup>14/</sup> In answer to Commissioner Wells' question at oral argument regarding the format of the station, WAIT's managing partner replied that it broadcast semi-classical music and Broadway tunes. (J.A. 290). The Commission noted that at least four other Chicago stations provide the service area with this type of programming at night on FM (J.A. 299, n. 26).

considerations as programming when making permanent allocation decisions.<sup>15/</sup>

Furthermore, WAIT has not demonstrated that its proposal would serve the objectives established by the Commission in licensing secondary stations on broken-down I-A clear channels. In arriving at a policy of duplicating certain clear channels, the Commission contemplated a carefully controlled basis which would (i) protect skywave service on the channel and also (ii) assure that new service would be provided in

<sup>15/</sup> See Mel-Lin, Inc., 22 F.C.C. 2d 165, 18 Pike & Fischer, R.R. 2d 787 (1970), reconsideration denied, 26 F.C.C. 2d 908, 20 Pike & Fischer, R.R. 2d 767 (1970). See generally, Semrow Broadcasting Co., 7 Pike & Fischer, R.R. 2d 645, 652 (1966) (Cox, concurring):

Once an allocation is made, it is for all practical purposes permanent--but programming is fleeting. Under the Commission's policies, the licensee is under a duty to ascertain the needs and interests of the area he serves and to meet those needs. He is expected to change his programming if he finds changing needs and interests. Also, a change in ownership may bring a change in emphasis, which, while responsive to certain of the needs and interests of the area, may be completely different from the programming basis upon which an allocation change might have been predicated.

See also Industrial Broadcasting Co. v. F.C.C., D.C. Cir. Case No. 23,856, decided December 16, 1970, (English language programming); Cornell University v. United States, 427 F.2d 680 (2d Cir. 1970), (local public service programs); 560 Broadcast Corporation v. F.C.C., supra, (local programs); Buckley-Jaeger Broadcasting Corp. v. F.C.C., supra, (Classical music); James S. Rivers v. F.C.C., supra, (Negro-oriented programs); Williams v. F.C.C., 120 U.S. App. D.C. 385, 347 F.2d 479 (1965), (programs oriented towards Indians).

areas presently unserved by primary nighttime signals. 47 CFR 73.22; Clear Channel Broadcasting, supra, 31 F.C.C. at 575-576; The Goodwill Stations, Inc. v. F.C.C., 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). In this regard the Commission noted (J.A. 294, n. 13):

As the Commission concluded in the Clear Channel case, to serve the public interest, a breakdown of the clear channels must be on a carefully controlled basis, one which gives a measure of protection to skywave service on the channel and which assures that new service will be located in presently underserved areas and not in metropolitan centers already receiving a large number of signals. See Section 73.22(a) which assigns those clear channel frequencies which have been "broken down" to such States as Utah, Wyoming, New Mexico, et al.

WAIT's proposal violates both the letter and spirit of the clear channel rule as well as not serving the policy behind the clear channel breakdowns. On this point the Commission stated that "[if] clear channels are going to be duplicated, and duplicated according to our rules on a systematic and controlled basis, then most assuredly the public interest will not be served by authorizing another nighttime station in Chicago" (J.A. 294). Indeed, in the clear channel rule making the Commission noted that "all too often" proposals to improve the facilities of

Class II stations (such as WAIT's proposal) involve the addition of service "in the areas of concentrated population." This was clearly contrary to the Commission's objectives. 31 F.C.C. at 580. Thus, WAIT's proposal for Chicago, which would cause interference to WBAP and serve no white area, is precisely the type of service which not only undermines the clear channel policy of the Commission, but fails to serve the allocations objectives of the broken-down clear channels.<sup>16/</sup>

Furthermore, WAIT's proposal would also severely affect future proposals which might satisfy the Commission's objectives. For example, WDAE, Ellsworth, Maine, has recently petitioned the Commission for rule making to "break down" 820 kHz and for authorization to broadcast at night. As noted by the Commission, WDAE's proposal is highly efficient, would not cause interference to WBAP, would serve a large percentage of "unserved" area, and generally would appear to meet at least some of the earlier objections to duplicating 820 which the Commission expressed in 1961. The WAIT proposal, however, would greatly limit WDAE's proposed service area, a substantial segment of which would reach "unserved" area, thus diminishing the effectiveness of WDAE's proposal.

---

<sup>16/</sup> In addition, the interference WAIT's proposal would cause is far in excess of that allowable for a secondary station on a broken-down clear channel. 47 CFR 73.22(d).

In sum, WAIT's request for waiver of the clear channel rule satisfies neither the Commission's objections to duplicating service on 820 kHz, as spelled out in its 1961 Report and Order, nor the policies which the Commission established in choosing which station should be authorized at night once a clear channel is broken down. WAIT's proposal would interfere with the signals of three existing stations, thereby destroying a third or fourth service to millions of people, would serve no area or population presently without primary standard broadcast service at night, and would generally restrict the Commission's flexibility in dealing with allocations problems in the future. These factors are not outweighed by WAIT's providing a 26th nighttime broadcast service of non-unique programming to the Chicago area. The proposal, then, violates not only the clear channel rules, but also the policies underlying those rules; indeed, it is precisely the type of proposal the rules were established to prevent.



B. The WAIT Application Undermines The Policy Behind The Commission's "Unserved" Area Or Population Rule.

Section 73.24(b)(3)(ii) of the Commission's rules, 47 CFR 73.24(b)(3)(ii), provides that an application for a new nighttime service shall not be accepted unless it would provide a first primary AM service to at least 25 percent of the area or population within the station's proposed interference-free service area. WAIT's proposal would provide a first primary service to no area or population. The station contends that Section 73.24(b)(3)(ii) does not apply to it because in the Notice of Proposed Rule Making preceding adoption of this rule the Commission stated that it was not considering operation on Class I-A channels in that proceeding. AM Station Assignment Standards, 25 Pike & Fischer, R.R. 1615, 1631, n. 37 (1963) (Br. 15). WAIT then contends that because it is applying for authorization on a Class I-A channel, Section 73.24(b) does not apply to it. And Section 73.22(b), which also imposes a 25 percent first primary service requirement, is not applicable, according to WAIT, because it applies only to Class II-A stations as defined in Section 73.22(a), and 820 kHz is not included in this list. (Br. 15).

This argument is specious. Under the Commission's rules all nighttime applications must now serve white areas to the extent of at least 25 percent of the proposed interference-free contour. Section 73.24(b) only exempts Class II-A stations from its requirements. See Note to Section 73.24(b). Class II-A stations are those unlimited time Class II stations which operate on one of the broken-down Class I-A channels listed in Section 73.22(a). Since 820 kHz is not one of the listed broken-down channels, WAIT would not be a Class II-A station and thus it is not exempt from Section 73.24(b).<sup>17/</sup> Furthermore, even if WAIT were a Class II-A station, it would still have to meet the same "unserved" area or population requirements

---

<sup>17/</sup> The confusion which stems from the appellant's syllogism exempting itself from an important Commission allocation requirement is untangled when we look to the reason why WAIT is not a Class II-A station even though it seeks to broadcast at night on a clear channel. WAIT has never petitioned for rule making to place 820 kHz in the Section 73.22(b) list of duplicated clear channels. See supra, pp. 19-20. Thus, by obtaining waiver of the applicable clear channel rules and the "unserved" area or population requirement, WAIT would obtain duplication of 820 kHz without amendment of the rules placing that channel in Section 73.22(b). Only by WAIT's procedural maneuvering, then, does a station trying to operate at night on a Class I-A channel find itself not being a Class II-A station.

under Sections 73.24(i) and 73.22. This is a requirement that stations on broken-down channels must also comply with. It has been in the rules since 1961. It is obvious that the Commission never intended to exempt any class of station from the "unserved" area or population requirement.<sup>18/</sup>

More important, however, is the fact that WAIT's proposal undermines the policy which underlies both Section 73.24(b) (3) (ii) and Section 73.22. The first primary service requirement, which WAIT does not come close to meeting, has evolved from the Commission's former 10 percent rule.<sup>19/</sup>

<sup>18/</sup> It is noteworthy that in amending Section 73.24(b) (3) (ii) in 1968, the Commission stated (Nighttime Requirements for Standard Broadcast Station Assignments, 33 F.R. 4186 (1968)):

We note . . . that in providing in our 1961 clear channel decision for the assignment of Class II-A stations on certain Class I-A channels (31 FCC 565), we required that they bring a first primary service to at least 25 percent of the area or population to be served (§73.22(b)). Since there is no logical reason why nighttime assignment standards for Class II and Class III stations should be more restrictive than those governing Class II-A station assignments, we are amending §73.24(b) (3) to align the former with the latter.

The exception for Class II-A stations is also removed by Section 73.24(i), 47 CFR 73.24(i) (1970).

<sup>19/</sup> The Commission's wide discretion in dealing with the old 10 percent rule has been long recognized by this Court. E.g., Williams v. F.C.C., 120 U.S. App. D.C. 385, 347 F.2d 479 (1965); Sunshine State Broadcasting Company, Inc. (WBRO) v. F.C.C., 114 U.S. App. D.C. 271, 314 F.2d 276 (1963); Sayger v. F.C.C., 114 U.S. App. D.C. 112, 312 F.2d 352 (1962); Guinan v. F.C.C., 111 U.S. App. D.C. 371, 297 F.2d 782 (1961).

Because the AM band had become saturated, and the Commission feared that a substantial number of additional nighttime grants would cause cumulative interference and actually decrease AM reception, it adopted an absolute standard rather than the case to case approach specified by the 10 percent rule. AM Station Assignment Standards, 24 F.R. 9492, 2 Pike & Fischer, R.R. 2d 1650 (1964).<sup>20/</sup>

The Commission found that the need for additional local service in areas already receiving primary broadcast service did not outweigh the disadvantages of decreased reception and additional interference (although not recognized as objectionable under the rules) resulting from numerous additional nighttime assignments. The findings that available FM assignments would be more efficient, and that television has replaced radio as the dominant nighttime broadcast medium further supported this conclusion. Id., 2 Pike & Fischer, R.R. 2d at 1671-1672. Thus an application for a new nighttime authorization is not accepted unless at least 25 per cent of the area or population within the proposed interference-free service area would thereby receive a first primary AM service.

---

<sup>20/</sup> The phenomenon of cumulative interference is simply explained. It is an accepted engineering principle that the sum total of additional assignments which individually cause a negligible amount of interference is not negligible. A substantial increase of signals would generally degrade AM reception. Thus, in 1963 the Commission stated that preservation of existing service would be the main allocation objective. AM Station Assignment Standards, 25 Pike & Fischer, R.R. 1615, 1626 (1963). See supra, n.12.

WAIT's proposed signal typifies the situation about which the Commission was concerned in creating the "first primary service" requirement. As the Commission explained (J.A. 298):

. . . our basic policy to regulate future allocations on the Class I-A channels on a controlled basis was adopted primarily because of this incremental interference caused by new nighttime allocations. Specifically, interference in this case would be caused not only within the secondary service area of the Class I-A facility in Texas, but also far beyond; strong signals would also result in vast areas where interference would occur should we subsequently consider additional nighttime operations.

WAIT's proposal simply adds another signal in the Chicago area, which is already served by many local stations at night. WAIT has not met the objectives raised by the Commission in the 1964 Report and Order, supra. The proposal would cause interference on two adjacent channels as well as on its own frequency, and thus can only be viewed as contravening the policies behind the rule in question. See 560 Broadcast Corp. v. F.C.C., supra.<sup>21/</sup>

<sup>21/</sup> In this connection it should also be noted that WAIT's proposal would be highly inefficient in that it would fail to serve 30.7 percent of the population and 80.5 percent of the area within its 2.5 mv/m normally protected contour. This would have been a gross violation of the old less restrictive 10 percent rule, supra. The Commission took note of this inefficiency which is, of course, a relevant factor (J.A. 295, n. 14)

The policy behind Section 73.22(b) would be equally contravened by a waiver. As the Commission stated in adopting the 25 percent first primary service requirement with respect to clear channel duplications, Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565, 593 (1961):

We adopt this minimum criterion because, obviously, a proposed operation which would not add this much service to present white areas would not greatly serve to fulfill our objective, and at the same time would, probably, if not certainly, block a later operation which would be of more value in this connection.

The WAIT proposal runs directly counter to these considerations. It does not fulfill the objective of serving new areas which do not receive primary service, and as noted above, pp. 8, 24, it would block another, apparently better proposal which would satisfy the rules.<sup>22/</sup>

In addition to the interference caused within WBAP's 0.5 mv/m - 50 percent skywave contour, the Commission considered the interference caused to WBAP beyond that contour and to WCCO and WGY, the stations on the two frequencies adjacent to 820 kHz (J.A. 296).<sup>23/</sup> WAIT urges that this interference, which is not recognized as "objectionable" under the Commission's rules, should not

<sup>22/</sup> See discussion, supra, pp. 22-23, where it is pointed out that allocation of Class II-A stations on broken-down channels is done on a geographical basis using existence of unserved areas as the principal criterion.

<sup>23/</sup> Interference would be caused to the WCCO groundwave service in 9200 square miles in a crescent-shaped area north of Minneapolis, to the WCCO skywave service in 1500 square miles near Chicago, and to the WGY skywave service in 2600 square miles near Chicago (J.A. 264-266, 279-282).

be considered. This argument follows WAIT's long arguments explaining that the policies behind the rules, not the rules themselves, should be paramount. WAIT, however, would mechanically apply the "objectionable" interference rules where it helps its case. Obviously in ruling on a waiver of engineering allocations rules, it is in the public interest for the Commission to consider all interference which would result even though some is not considered "objectionable" under the rules. See Interstate Broadcasting Co. v. F.C.C., 116 U.S. App. D.C. 327, 331, 323 F.2d 797, 801 (1963). As the Commission explained (J.A. 296):

When an applicant requests a waiver of the rules which have been promulgated in the public interest, all factors become relevant to that interest. Almost all new allocations for AM stations will cause some interference not recognized as objectionable under our rules. This does not mean, however, that the Commission considers it desirable to permit such interference.

The Commission went on to hold that the loss of service, in order to provide Chicago with its 26th nighttime station, is not in the public interest. (J.A. 297).

Furthermore, WAIT suggests that the policies of the first primary service requirement are met since it interferes



with WBAP's 0.5 mv/m - 50 percent skywave contour only in areas receiving at least two signals. As in the case of the clear channel rules, this negative argument does not reach the thrust of the "unserved" area or population rules. It is the Commission's policy decision that additional nighttime AM signals are undesirable unless substantial new areas would receive a first primary service. WAIT's proposal would simply take a third or fourth service away from millions of people (J.A. 234) and give Chicago its 26th nighttime broadcast signal instead. If WAIT considers this in the public interest, it is actually questioning the underlying basis for the first primary service rule, a tack which should be pursued in the broad context of the rule making process rather than by waiver of the rule.<sup>24/</sup>

Finally, the foregoing discussion shows that the Commission adequately set forth the reasons for denying WAIT's waiver request. As this Court has stated, the Commission

---

<sup>24/</sup> As stated in connection with the clear channel rules, supra, p.21, WAIT's programming proposal is not sufficient to justify a waiver of these important allocation rules.

is not required to dot "i's" and cross "t's." "Courts are indulgent toward administrative action to the extent of affirming an order where the agency's path can be 'discerned' even if the opinion 'leaves much to be desired.'" WAIT Radio v. F.C.C., supra, 135 U.S. App. D.C. at 320, 418 F.2d at 1156. Here, no indulgence is needed; despite WAIT's apparent misreadings, the Commission's opinions clearly set forth reasonable grounds, any one of which is adequate to support denial of WAIT's request. The "hard look" was clearly taken.

C. The Commission Did Not Abuse Its Discretion In Finding That A Conditional Waiver Of The Rules Would Not Serve The Public Interest.

WAIT argues that it should be granted at least a conditional waiver of Sections 73.21, 73.22, 73.24(b)(3), 73.25, and 73.182 of the Commission's rules in order that the frequency be occupied until the Commission at some future time determines that other proposals are more in the public interest. WAIT is willing to provide an additional voice now, "a voice

that no other station proposes to offer" (Br. 19), <sup>25/</sup> with the promise that it will become silent again if the Commission finds a better proposal. This argument fails on several levels.

First, the Commission cannot grant authority to broadcast at night until it makes the affirmative finding that the station's operation would serve the public interest. Cf. Office of Communication of the United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 342, 359 F.2d 994, 1008 (1966); Borrow v. F.C.C., 109 U.S. App. D.C. 224, 226, 285 F.2d 666, 668, cert. denied 364 U.S. 892 (1960). As the Commission clearly pointed out, it has made no such finding regarding WAIT's proposed operation on 820 kHz at night (J.A. 322). To the contrary, the Commission was not only concerned with

---

<sup>25/</sup> If WAIT means by this statement that no other station proposes to offer a voice on 820 kHz at night, it is simply inaccurate. As the Commission pointed out in its decision denying the waiver request, WDAE, Ellsworth, Maine, has petitioned for rule making to break down the frequency and to authorize it to operate at night. Supra, p. 8 (J.A. 294-295). If it means that no other station proposes to provide Chicago with semi-classics and Broadway show tunes at night (J.A. 290), the Commission found that four stations already provide this type of format, that WAIT's programming was not unique, and that at any rate, programming is not usually considered in allocations decisions.

future flexibility in its allocations functions, but it also found that WAIT's proposal would cause interference to three existing stations, that it would serve no "unserved" area, and that WAIT's programming was not unique. Under these circumstances, the public interest would not be served by adding WAIT as another nighttime station in Chicago, even on a temporary basis. Thus the Commission concluded (J.A. 322):

It is not so much the precedential impropriety of granting a conditional waiver which is of major concern to this Commission, but rather, the almost unimaginable consequences of doing so without a concomitant showing that such action is in the public interest.

Second, there is the practical problem of removing from the air a station which, under its conditional grant, has gained an audience in its service area. As the Commission pointed out, the disruption and complication, including lengthy hearings, attendant to rolling back the situation would most certainly tie the hands of the Commission in this area (J.A. 322). See Second Report and Order (CATV), Docket No. 14895, 2 F.C.C. 2d 725, 782 (1966). WAIT's offer to broadcast at night via "conditional waiver," then, settles none of the

problems and objections which the Commission had in refusing to grant the waivers in the first place, but only raises new ones.

Third, the "conditional" waiver is still a waiver of the clear channel rules, and specifically, would amount to de facto breaking down of 820 kHz. By granting even a conditional waiver, the Commission would not be affording interested parties and the general public the broad context of a rule making proceeding where the issue of whether or not to break down the channel would be addressed, as well as the very pertinent questions of who should obtain the authorization and where it should be located, whether on a temporary or permanent basis. Thus, it would appear that if the Commission decides to break down the channel in question, it should authorize a station which could substantially comply with the policies of the duplication rules (Section 73.22), rather than one which completely contravenes them. Thus there is no valid basis on which to grant WAIT's request now and then to hold a rule making proceeding to see if WAIT or someone else should be on the air at night. And we return once again to the fact that WAIT's proposal does not serve the public interest, even on a conditional basis, since it "not only fails to serve 'unserved' areas but a grant of its proposal would remove service from the interference area and add a service to the populated Chicago metropolitan area." (J.A. 294).

II. REFUSAL TO GRANT WAIT'S WAIVER REQUEST  
IS NOT AN ABRIDGMENT OF THE FIRST AMEND-  
MENT RIGHTS OF WAIT OR ITS LISTENERS.

WAIT argues that the Commission's refusal to waive its allocation rules constitutes overly broad regulation in derogation of the First Amendment rights of the station and its listeners. WAIT does not challenge the rules themselves, but rather makes the argument that failure to waive these valid rules in this instance constitutes an overly broad restriction on the station and its listeners. The appellant's contention, however, is inaccurate and insubstantial.

WAIT's argument is inaccurate in its assumption that it "has already demonstrated that application of FCC rules to prohibit its proposed operation cannot be justified as an attempt to preserve orderly communication." (Br. 21). This conclusion is based on two points: (1) that WAIT's proposal will not disrupt any signal in any white area (Br. 21), and (2) that objectionable interference occurs only in areas also served by other signals (Br. 22). As explained in the preceding section, and as the Commission carefully pointed out in its decisions, these points do not support WAIT's general

conclusion. WAIT either misinterprets the underlying policies of the clear channel and "unserved" area or population rules, or disagrees with them. If the latter is true, WAIT's remedy is to petition for rule making to change the rules. If the former is the case, WAIT's argument is insubstantial. And by basing its First Amendment claim on the above assumption, WAIT is merely stating in other terms its earlier argument that the Commission has not validly exercised its discretion under the Communications Act of 1934. This, of course, is insufficient as a separate and distinct First Amendment argument. As WAIT readily admits, "valid exercise of the powers conferred by the Communications Act is not a violation of the First Amendment." (Br. 21). National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943). See also Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 388 (1969); Carter Mountain Transmission Corp. v. F.C.C., 116 U.S. App. D.C. 93, 98, 321 F.2d 359, 364, cert. denied, 375 U.S. 951 (1963); WBEN, Inc. v. F.C.C., supra; Lafayette Radio Electronics Corp v. United States, 345 F.2d 278 (2d Cir. 1965).

The Commission was careful to outline the nexus between its allocations policies and the First Amendment



in its order denying reconsideration, 25 F.C.C. 2d 1016, 1019 (1970) (J.A. 322-323):

WAIT seeks to invoke the overbreadth principle of First Amendment cases contending that "free speech cannot be silenced merely because it fails to support a Commission policy." Although this contention is difficult to fault in the abstract, it falls far short of reality when viewed in the concrete. The goal of the Commission's allocation policy through the years has been to permit the maximum efficient use of spectrum space consonant with sound engineering standards, and thus foster rather than impede the exercise of free speech. While maintaining a rational system of allocations, we have managed as a result to assign 4,300 stations - or approximately 40 percent of the entire world's standard broadcast stations - within a 107 channel band. In order to sanction the operation of this many stations, it was necessary to prohibit about 2,000 of these facilities on a controlled basis from operating at night. To do otherwise would have inevitably resulted in fewer usable signals reaching the listening public because of the intolerable demands which would have been placed on the already critically congested nighttime band. We believe that this employment of controlled frequency allocation viewed realistically can hardly be equated with restraints upon free speech. For as long as there are substantially more individuals who want to broadcast than there are frequencies to allocate, "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Red Lion Broadcasting Co., Inc., et al. v. F.C.C., 395 U.S. 367, 399 (1969).

The Commission simply applied its allocations policies,

which underlie the rules in question, to the facts and justifications contained in WAIT's request. As the Commission explained, 22 F.C.C. 2d at 940-941 (J.A. 298-299):

Our basic policy to regulate future allocations on the Class I-A channels on a controlled basis was adopted primarily because of . . . incremental interference caused by new nighttime allocations. Specifically, interference in this case would be caused not only within the secondary service area of the Class I-A facility in Texas, but also far beyond; strong signals would also result in vast areas where interference would occur should we subsequently consider additional nighttime operations. \*\*\* Finally, the requirements of Section 73.24(b)(3) do not constitute an abridgement of free speech or waste of a communication resource, but rather, maintain, in the public interest, an intelligent plan of conservation. Our intention to "freeze" specific clear channels in order to preserve for future allocation those proposals which will serve the public in areas that are without primary standard broadcast service is clearly not an "overbreadth" of statutory regulation. The example of what effect a grant of WAIT's proposal would have on the efficiency of the Maine proposal, . . . [supra, p.8] should it be granted, clearly illustrates the wisdom of applying strict rules today in order to serve the public interest tomorrow. A grant of this proposal in an area that is replete with aural broadcast service is not in that interest.

Thus the Commission went beyond mere recitation of the National Broadcasting Co. case, supra, in treating WAIT's First Amendment claim. The Commission thoroughly considered

the appellant's contention of overbreadth of regulation here, but found it inapplicable to WAIT's claim.

Furthermore, WAIT's suggestion that the Commission does not understand the place of waivers in the administrative process demonstrates its narrow view of this case. The Commission receives many requests to authorize daytime only stations for fulltime operation. Where unique circumstances exist, the Commission will waive even its important "unserved" area or population rule, 47 CFR 73.24(b)(3). Capitol Broadcasting Corp. (WKEN), 6 F.C.C. 2d 446 (1967). The complete nondistinction of the present case, however, as well as direct contravention of the policies behind the rules in question, places WAIT's claim for waiver far below the standard of equitable justification necessary for favorable consideration. The Commission has a legitimate concern for the saturation of the AM band, the preservation of existing service, the need to limit additional nighttime signals because of cumulative interference, the aim of reaching "unserved" areas by new grants, and the integrity of the clear channel policy to justify denial of waivers except in the most extraordinary cases. While it is possible that failure to waive the rules in a truly unique case such as WKEN, supra, may constitute "overbreadth" of regulation, WAIT's proposal is clearly not in this class.

CONCLUSION

For the foregoing reasons, the Commission's orders should be affirmed.

Respectfully submitted,

RICHARD E. WILEY,  
General Counsel,

JOHN H. CONLIN,  
Associate General Counsel,

STUART F. FELDSTEIN,  
CHARLES M. FIRESTONE,  
Counsel,

Federal Communications Commission  
Washington, D. C. 20554

March 16, 1971.

JOINT BRIEF OF INTERVENORS

---

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,762

WAIT RADIO,  
a co-partnership,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee,*

MIDWEST RADIO-TELEVISION, INC.,  
CARTER PUBLICATIONS, INC.,  
CLEAR CHANNEL BROADCASTING SERVICE,  
*Intervenors.*

United States Court of Appeals  
for the District of Columbia Circuit

On Appeal from Orders of  
The Federal Communications Commission

FILED MAR 21 1977

*Nathan J. Firestone*  
Carter

MICHAEL FINKELSTEIN  
Finkelstein & Firestone  
1725 K Street N.W.  
Washington, D. C. 20006  
*Counsel for Intervenor*  
Carter Publications, Inc.

PETER SHUEBRUK  
45 Rockefeller Plaza  
New York, N. Y. 10020  
HERBERT M. SCHULKIND  
HOWARD J. BRAUN  
1211 Connecticut Avenue, N.W.  
Washington, D.C. 20036

*Counsel for Intervenor*  
Midwest Radio-Television, Inc.

R. RUSSELL EAGAN  
ERWIN G. KRASNOW  
Kirkland, Ellis, Hodson, Chaffetz  
Masters & Rowe  
1776 K Street N.W.  
Washington, D. C. 20006  
*Counsel for Intervenor*  
Clear Channel Broadcasting Service



## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUE PRESENTED . . . . .	1
THE INTERVENORS HEREIN . . . . .	1
COUNTERSTATEMENT OF THE CASE . . . . .	3
ARGUMENT:	
I. THE WAIT PROPOSAL: AN OVERVIEW . . . . .	4
II. THE COMMISSION'S CLEAR CHANNEL POLICY PROPERLY BARS A GRANT OF THE WAIT APPLICATION . . . . .	6
III. THE COMMISSION PROPERLY CONSIDERED ADJACENT CHANNEL INTERFERENCE TO WCCO AND WGY. . . . .	10
CONCLUSION. . . . .	13

## TABLE OF AUTHORITIES

## Cases:

<i>560 Broadcast Corp. v. F.C.C.</i> , 135 U.S. App. D.C. 330, 418 F.2d 1166 (1969) . . . . .	12
<i>Interstate Broadcasting Co. v. F.C.C.</i> , 116 U.S. App. D.C. 327, 323 F.2d 797 (1963) . . . . .	12
<i>The Goodwill Stations, Inc. v. F.C.C.</i> , 117 U.S. App. D.C. 64, 325 F.2d 637 (1963) . . . . .	6
<i>KXA, Inc. v. F.C.C.</i> , Case No. 20,527, decided June 30, 1967, unreported . . . . .	11
<i>Rio Grande Family Radio Fellowship, Inc. v. F.C.C.</i> , 132 U.S. App. D.C. 128, 406 F.2d 664 (1968) . . . . .	14
* <i>WAIT Radio v. F.C.C.</i> , 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) . . . . .	1
<i>WEOK Broadcasting Corp. v. F.C.C.</i> , Case No. 19,220, decided September 8, 1965, reported unofficially, 6 Pike & Fischer, RR 2d 2044. . . . .	11
<i>Wright and Maltz, Inc. v. F.C.C.</i> , Case No. 18,222, decided March 24, 1964 reported unofficially, 2 Pike & Fischer, RR 2d 2056. . . . .	11

---

\* Cases and other authorities chiefly relied upon are marked with an asterisk.



*Rules and Regulations of the Federal Communications  
Commission, 47 CFR (1970):*

Section 73.24 . . . . .	7, 5
Section 73.25 . . . . .	2, 5
Section 73.37 . . . . .	11
Section 73.182 . . . . .	5, 11

**Other Authorities:**

* <i>AM Station Assignment Standards,</i> 25 Pike & Fischer, RR 1615 (1963) (Notice of Proposed Rule Making). . . . .	14
* <i>AM Station Assignment Standards,</i> 24 F.R. 9492, 2 Pike & Fischer, RR 2d 1658 (1964) (Report and Order). . . . .	4, 14
* <i>Clear Channel Broadcasting in the Standard Broadcast Band,</i> 31 FCC 365 (1961), reconsideration denied, 24 Pike & Fischer, RR 1595 (1962). . . . .	6, 9
<i>In the Matter of Amendment of Section 1 of the Standards of Good Engineering Practice Concerning Standard Broad- cast Stations, 10 Pike &amp; Fischer, RR 1595 (1954) . . . . .</i>	14

---

\* Cases and other authorities chiefly relied upon are marked with an asterisk.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,762

---

WAIT RADIO,  
a co-partnership,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee,*

MIDWEST RADIO-TELEVISION, INC.,  
CARTER PUBLICATIONS, INC.,  
CLEAR CHANNEL BROADCASTING SERVICE,  
*Intervenors.*

---

On Appeal from Orders of  
The Federal Communications Commission

---

## JOINT BRIEF OF INTERVENORS

---

### STATEMENT OF THE ISSUE PRESENTED

The issue presented by the instant appeal is properly set forth on page 1 of Appellee's brief.<sup>1</sup>

---

<sup>1</sup> This case was before this Court on a prior appeal (Case No. 21,689) and reported as *WAIT Radio v. F.C.C.*, 135 U.S. App. D.C. 317, 418 F. 2d 1153 (1969).

### THE INTERVENORS HEREIN

Intervenor Carter Publications, Inc. is the licensee of clear channel standard broadcast (AM) station WBAP, Fort Worth, Texas, which operates fulltime with a power of 50 kw on the Class I-A frequency 820 kc. Pursuant to the Rules and Regulations of the Federal Communications Commission (47 CFR § 73.25), WBAP is the only station permitted to operate at night on the frequency 820 kc.

Intervenor Midwest Radio-Television, Inc. is the licensee of clear channel standard broadcast (AM) Station WCCO, Minneapolis, Minnesota, which operates fulltime with power of 50 kw on the Class I-A frequency 830 kc, one channel removed from the frequency 820 kc.

By its proposed 10 kw fulltime operation with a directional antenna at night, WAIT will cause co-channel and adjacent channel electrical interference to WBAP and to WCCO respectively, in certain portions of the United States presently served by these stations. Consequently, a reversal or modification of the Commission's Orders (J.A. 291, 319) under review herein, would adversely affect and seriously aggrieve both WBAP and WCCO.

Intervenor Clear Channel Broadcasting Service (CCBS) is an organization of Class I-A clear channel stations whose primary purpose is the improvement of radio service to the entire nation through more efficient use of the Class I-A clear channels allocated to the United States. WBAP is a member of this organization. Among other things, CCBS believes that it is in the public interest to preserve the unduplicated status of Class I-A clear channels by not allowing more than one station to use such channels at night. WAIT's proposal to operate nighttime on the frequency 820 kc would conflict with this policy, and, therefore, CCBS would be adversely affected thereby.

## COUNTERSTATEMENT OF THE CASE

Intervenors adopt Appellee's Counterstatement of the Case, but wish to emphasize that a careful reading of that Counterstatement is especially important because of the numerous misstatements and omissions in WAIT's brief. Specifically, WAIT has misstated the salient facts upon which the Commission's Orders herein were predicated. Furthermore, WAIT's brief includes a so-called "Statement of Agreed Facts" listing seven points upon which it alleges the parties herein have agreed (Br. pp. 6-8). Contrary to this assertion, however, neither the Commission nor Intervenors have ever "agree[d] on the validity of these facts." (Br. p. 7). Indeed, many of WAIT'S "seven points" are nothing more than its own version of those points which it believes are most favorable to its appeal. Many of these points, however, have been decided against WAIT and are now being argued on appeal.

Likewise, WAIT claims that there are "two other important points" upon which it and the Commission have agreed. (Br. pp. 7-8). But again, this is not so. In fact, WAIT's "two other important points" are nothing more than a recitation by the Commission of certain contentions made by WAIT. The record citations furnished by WAIT clearly reflect this fact.

### I.

#### THE WAIT PROPOSAL: AN OVERVIEW

WAIT summarizes its argument as follows:

"The issue in the case is simple, once all the technical verbiage is cleared away. WAIT Radio stands ready and able to supply a new radio voice to over 4,400,000 people in the Chicago area. This additional service can be supplied without taking radio service from anyone else." (Brief, p. 24)

But what WAIT asks this Court to ignore as "technical verbiage" represents:

—A loss of service to all people residing within a 73,054 square mile area inside the 0.5 mv/m 50% nighttime skywave contour of station WBAP (J.A. 278), an area encompassing more than 2,165,000 people.<sup>2</sup> (J.A. 66)

—A loss of service to all people residing within a 926,664 square mile area outside the 0.5 mv/m 50% skywave contour of station WBAP. (J.A. 278)

—A loss of service to all people residing within a 1,554 square mile area inside the 0.5 mv/m 50% skywave contour of station WCCO, Minneapolis, Minnesota. (J.A. 282)

—A loss of service to all people residing within a 9,264 square mile area inside the 0.1 mv/m groundwave contour of station WCCO. (J.A. 282)

—A loss of service to all people residing within a 2,662 square mile area inside the 0.5 mv/m skywave contour of station WGY, Schenectady, New York. (J.A. 282)

The WAIT proposal also represents:

—A violation of Sections 73.25(a) and 73.182(a)(1)(i), of the Commission's Rules, 47 CFR § 73.25(a) and § 73.182(a)(1)(i), which prohibit additional nighttime stations on clear channel frequencies, including 820 kc, the WBAP frequency. (J.A. 292)

---

<sup>2</sup> An AM station transmits both groundwave and skywave signals. Primary service is provided by a station's groundwave signal and secondary service is provided by a station's skywave signal, which signal is less constant in intensity than a groundwave signal. The normal nighttime service area of WBAP is defined under the Commission's Rules as the area where a signal strength of 0.5 mv/m is present 50% of the time. A signal of some lesser strength is also present during other times as well, and as long as interference is not created by other stations operating on the same or adjacent frequencies, that signal will be of receivable quality. See *AM Station Assignment Standards*, 2 Pike & Fischer RR 2d 1658, 1663 (1964). Therefore, contrary to WAIT's assertion (Brief, Technical Appendix, A-3), the fact that an 0.5 mv/m signal may be present only 50% of the time does not mean that "if a joke is being told in the broadcast, the listener has a fifty-fifty chance of missing the punch line because of the fading out or distortion of the signal." It means that because of fading or distortion, the punch line may be slightly more difficult to hear.

—A violation of Section 73.24(b) of the Commission's Rules, 47 CFR § 73.24 (b), which prohibits new nighttime stations which would cause objectionable interference to any station on any frequency and which would not serve 25% of an area or population without any primary broadcast service. (J.A. 320)

WAIT would have the Commission overlook the foregoing substantial violations of its rules and allocation policies to provide:

—The 26th nighttime radio station in the Chicago area. (J.A. 322)

—The 5th Chicago station to offer a semi-classical and Broadway music format. (J.A. 299)

—An antenna system so highly restricted that the station would not serve the entire city of Chicago. (J.A. 130)

It is against this background that the Commission's further "hard look" at the WAIT proposal must be viewed.

## II.

### THE COMMISSION'S CLEAR CHANNEL POLICY PROPERLY BARS A GRANT OF THE WAIT APPLICATION

In its Report and Order on *Clear Channel Broadcasting in the Standard Broadcast Band*, 31 FCC 565 (1961), reconsideration denied, 24 Pike & Fischer, RR 1595 (1962), *aff'd sub nom., The Goodwill Stations, Inc. v. FCC*, 117 U.S. App. D.C. 64, 325 F. 2d 637 (1963), the Commission resolved a lengthy proceeding involving the clear channel frequencies. The Commission concluded that while there was a need for additional nighttime stations located in remote areas without primary AM radio service, there was also a vital need for the continued wide-area service provided by clear channel stations. To reconcile these dual and potentially conflicting needs, the Commission decided to "break down" half the clear channel frequencies and to

preserve the remainder for continued use by only one station operating at night on each frequency.<sup>3</sup>

The Commission then preceeded to study each of the 25 clear channel frequencies to determine which would be most suitable for nighttime duplication by a station which would serve the "important and immediate objective of providing nighttime primary service to white areas" (31 FCC at 577) and which others would be most suitable for continuation as a clear channel frequency serving wider areas of the country. After careful evaluation, spelled out in its Report and Order, the Commission decided that 820 kc was one of the 12 frequencies that should remain unduplicated.

In the pleadings filed with the Commission in support of its application, WAIT was careful to disclaim any intention of attacking the Commission's clear channel policy. Rather, WAIT repeatedly argued that those policies are inapplicable since the WAIT proposal would cause no interference to WBAP in any "white areas" within the WBAP 0.5 mv/m contour which, WAIT claims, delineates the extent of the WBAP service area. It is, however, no answer to multiple violations of the Commission's Rules and policies to say that the WAIT proposal would not result in *loss* of "white area" service; for the WAIT proposal would not result in any *gain* in "white area" service. The WAIT proposal therefore conflicts with one of the basic tenets of the Commission's clear channel policy as enumerated in the 1961 Report and Order. As the Commission stated, "... we will not consider any application for a new unlimited-time station on one of the Class 1-A channels unless it meets a specified minimum criterion<sup>4</sup> for new primary service to white areas." (31 FCC at 579).

---

<sup>3</sup> In its Report and Order, the Commission noted that the preservation of half the clear channel frequencies would afford the Commission flexibility to reconsider its clear channel policy in the light of future developments, such as possibly authorizing an increase in the maximum power of the clear channels. (31 FCC at 577).

<sup>4</sup> This criterion was 25% new primary service to white areas. See 47 CFR § 73.24(b).



In claiming that it would not violate the policy behind the clear channel rules since "... there is no 'white area' within the (WBAP) protected contour which would receive interference from WAIT's operation" (Brief p. 14),<sup>5</sup> WAIT, therefore, misses the point; for it overlooks the fact that the Commission broke down 13 clear channel frequencies in 1961 in order to accommodate new stations that would, themselves, serve substantial "white areas." Thus, it is the Commission's policy to maximize service to underserved areas both through clear channel stations and through other nighttime stations operating on clear channel frequencies. In both instances, service to "white areas" is the primary consideration. WAIT, through its proposal of a 26th nighttime service to the Chicago area, but with no service to any white area, would do nothing to further this basic Commission policy. Hence, it has no grounds for requesting a waiver of the Rules barring its application.

Moreover, even where the Commission in its 1961 Report and Order provided for duplication on certain clear channels (to provide greater "white area" service), it also required that such duplicated clear channel stations "be protected to their 0.5 mv/m, 50% skywave field strength contour." (31 FCC at 581-2). WAIT, while not providing any new primary "white area" service, would cause significant interference to the WBAP signal within the 0.5 mv/m contour of that station.

Contrary to the "slight" interference characterized by WAIT (Br. p. 7), the interference would involve 2,165,000 people residing within an area in excess of 73,000 square miles (compared to the 398 square miles proposed to be served by WAIT). Significantly, such interference is not merely a substitution of WAIT's signal for that of WBAP. Rather, it is a net loss of service, since the two signals would be mutually destructive in an area encompassing five

<sup>5</sup> WAIT claims that this is a point on which "The parties agree . . ." (Brief, p. 14). Intervenor do not agree. As the Commission pointed out in footnote 7(a) of its May 11, 1970 Memorandum Opinion and Order (J.A. 292), the entire area receiving signals beyond the 0.5 mv/m 50% contour is also "protected."

states. Such a vast loss of service with no offsetting gain in service to white area goes directly against the grain of the Commission's allocation policy.

Furthermore, the WAIT proposal would result in a loss of WBAP's service to a large area beyond WBAP's 0.5 mv/m skywave contour, which area is without primary nighttime service from any station.<sup>6</sup> And this interference, too, must be considered in determining whether duplication of 820 kc at night is warranted.

Indeed, in its 1961 Report and Order, the Commission carefully considered the loss of service beyond the 0.5 mv/m skywave contour that would result from the operation of new stations on the duplicated clear channel frequencies, and finally concluded that such loss was "acceptable in view of the additional services which are thereby made possible from new stations in underserved areas." (31 FCC at 575) But WAIT proposes no new service to underserved areas, and there is, therefore, no basis for the elimination of service beyond WBAP's 0.5 mv/m skywave contour that will result from a grant of the WAIT application.<sup>7</sup>

### III.

#### THE COMMISSION PROPERLY CONSIDERED ADJACENT CHANNEL INTERFERENCE TO WCCO AND WGY

The Commission found that WAIT's proposed nighttime operation would also cause substantial adjacent channel interference to the skywave service

---

<sup>6</sup> The proposed operation of WAIT would involve interference to the reception of secondary service of WBAP in the northwestern portion of the United States in an area which receives the least amount of radio service. Much of the area which would receive such interference (e.g., South Dakota, North Dakota, and Montana) is without primary nighttime service. (J.A. 90).

<sup>7</sup> Thus, WAIT's contention that its proposal "would result in absolutely no objectionable interference with WBAP's clear channel signal in any white area" (Brief, p. 13) is incorrect.

areas of WCCO (830 kc) and WGY, Schenectady, New York, a clear channel station operating on the frequency 810 kc (J.A. 296-97, 320-21). It would also cause interference within WCCO's groundwave 0.1 mv/m service area (J.A. 265, 279).

In particular, WAIT's proposal would result in a loss of WCCO's and WGY's skywave service in a 1,554 and 2,662 square mile area, respectively.<sup>8</sup> (J.A. 264-66, 279-82). Whatever the definition of such interference under the Commission's rules, the plain fact is that it is objectionable since persons residing in the foregoing areas will lose existing service from WCCO and WGY.<sup>9</sup>

Notwithstanding the foregoing, WAIT argues that the large deprivation of service which its proposal will cause to the areas and populations served by WCCO and WGY should *not* be considered by the Commission herein because such interference is not deemed "objectionable" under the Commission's Rules (See 47 CFR § 73.37(a) and § 73.182(a)(1)). Thus, WAIT contends that the onus should be placed upon the Commission or Intervenor~~s~~ to show special circumstances warranting the Commission's consideration of such interference. Significantly, WAIT cites no authority for this latter contention.

While WAIT obviously would prefer the Commission to ignore the substantial interference caused by its proposal to portions of WCCO's and WGY's service areas, the Commission's consideration thereof was not only entirely proper, but indeed was required. In several prior AM allocation cases, this Court has consistently rejected the same contention now advanced by WAIT — that it was

---

<sup>8</sup> Additionally, WAIT's nighttime proposal would cause interference to WCCO's 0.1 mv/m groundwave service in 9,264 square miles north, northeast and east of Minneapolis, Minnesota, WCCO's city of license (J.A. 265, 279, 282).

<sup>9</sup> Attempting to mitigate the adverse consequences of its proposal, WAIT contends that its proposal will cause only "some interference" to WCCO and WGY (Br. p. 7). Any review of the record below, however, clearly shows that WAIT's proposal actually will cause substantial interference to these stations (J.A. 264-66, 279-82).

improper or unreasonable for the Commission to take into account interference which is not recognized as "objectionable" under its Rules. *Wright and Maltz, Inc., v. F.C.C.*, Case No. 18,222, decided March 24, 1964, reported unofficially at 2 Pike & Fischer, RR 2d 2056; *WEOK Broadcasting Corp. v. F.C.C.*, Case No. 19,220, decided September 8, 1965, reported unofficially at 6 Pike & Fischer RR 2d 2044; *KXA, Inc. v. F.C.C.*, Case No. 20,527, decided June 30, 1967, unreported. WAIT's contention in this regard should also be similarly rejected.

Clearly, in ruling upon a request for waiver of fundamental technical allocation rules, as here, the public interest requires the Commission to evaluate all cognizable interference caused by a particular proposal to existing stations, although such interference may not be deemed "objectionable" under the Commission's Rules. See *Interstate Broadcasting Co., Inc. v. F.C.C.*, 116 U.S. App. D.C. 327, 323 F. 2d 797 (1963); see also *560 Broadcast Corporation v. F.C.C.*, 135 U.S. App. D.C. 330, 418 F. 2d 1166 (1969). In short, "[d]eprivation of a recognized but unprotected signal is a valid consideration in reaching a conclusion on the question of the public interest." (J.A. 297).

As the Commission explained (J.A. 295):

"When an applicant requests a waiver of the rules which have been promulgated in the public interest, all factors become relevant to that interest. Almost all new allocations for AM stations will cause some interference not recognized as objectionable under our rules. This does not mean, however, that the Commission considers it desirable to permit such interference. It only means that we have sacrificed optimum broadcast standards in order to serve other aspects of the public interests."

The Commission then found that if WAIT's proposal was granted, "... a large area would lose reception of WCCO and WGY signals where they are not protected from interference under our rules." (J.A. 297). Accordingly, the Commission concluded that this loss of service, in order to provide the Chicago, Illinois area with a 26th nighttime radio station, "... simply is not in the public interest." (J.A. 297)

There are sound reasons for the Commission's consideration of the interference to WCCO and WGY. For such interference will result not only in a degradation of AM broadcast service on WCCO's and WGY's frequencies, but also, will contribute to an over-all deterioration of AM broadcast service throughout the country, a fact which has been established for many years. See *In the Matter of Amendment of Section 1 of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations*, 10 Pike & Fischer, RR 1595 (1954); *AM Station Assignment Standards*, 24 F.R. 9492, 2 Pike & Fischer, RR 2d 1658 (1964).

Specifically, in 1963 and 1964 when the Commission conducted extensive rulemaking proceedings on AM allocation policies and technical standards, it stated that preservation of existing AM radio service would be its main allocation objective. *AM Station Assignment Standards*, 25 Pike & Fischer, RR 1615, 1626 (1963). To this end, the Commission found that not only would new nighttime stations have very highly restricted service areas due to interference, but also, that such stations would interfere with the service of other stations, including areas where no interference was readily discernible since "*all stations, particularly during nighttime hours, cause and receive some degree of interference, some percentage of the time which is unrecognized by definitions in the Rules.*" (Emphasis added). *AM Station Assignment Standards*, 2 Pike & Fischer, RR at 1665. In this connection, the Commission pointed out that each new signal added on a particular channel increases the probability of interference at a location, regardless of whether or not "objectionable interference" is recognized under the rules; and, the aggregate or cumulative effect of interference caused by grants such as WAIT's is not negligible. *AM Station Assignment Standards*, 25 Pike & Fischer, RR at 1626. On the contrary, a general over-all degradation of the AM spectrum results. *Ibid.*

In sum, WAIT's argument that some special showing must be made to warrant the Commission's consideration of interference to WCCO and WGY is

wholly without merit. It also displays a fundamental misconception on WAIT's part of the "high hurdle" it must overcome to justify a grant of its waiver request. *WAIT Radio v. F.C.C.*, 135 U.S. App. D.C. at 321, 418 F. 2d at 1157. It is WAIT, not WCCO or WGY which is seeking a waiver of the Commission's Rules. Thus, it is WAIT's responsibility, and WAIT's alone, "to plead with particularity the facts and circumstances which warrant such action." *Rio Grande Family Radio Fellowship, Inc. v. Federal Communications Commission*, 132 U.S. App. D.C. 128, 130, 406 F. 2d 664, 666 (1968), and to establish why a waiver of established Commission policies and tested rules is consonant with the paramount public interest. *WAIT Radio v. FCC, supra*. This however, WAIT has failed to do.

CONCLUSION

For the foregoing reasons, the Commission's Orders under review herein should be affirmed.

Respectfully submitted,

CARTER PUBLICATIONS, INC. (WBAP)

---

MICHAEL FINKELSTEIN

Finkelstein & Firestone  
1725 K Street, N. W.  
Washington, D. C. 20006

*Its Attorneys*

MIDWEST RADIO-TELEVISION, INC. (WCCO)

---

PETER SHUEBRUK

45 Rockefeller Plaza  
New York, New York 10020

---

HERBERT M. SCHULKIND

---

HOWARD JAY BRAUN

Fly, Shuebruk, Blume & Gaguine  
1211 Connecticut Avenue, N. W.  
Washington, D. C. 20036

*Its Attorneys*

CLEAR CHANNEL BROADCASTING SERVICE

---

R. RUSSELL EAGAN

---

ERWIN G. KRASNOW

Kirkland, Ellis, Hodson, Chaffetz  
Masters & Rowe  
1776 K Street, N. W.  
Washington, D. C. 20006

*Its Attorneys*

March 26, 1971



---

IN THE  
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA ~~CIRCUIT~~ *United States Court of Appeals*  
*the District of Columbia Circuit*

No. 24,762 **FILED** APR 12 1971

WAIT RADIO, a co-partnership, *Nathane J Paulson*  
CLERK

*Appellant.*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee.*

MIDWEST RADIO-TELEVISION, INC., CARTER  
PUBLICATIONS, INC., CLEAR CHANNEL  
BROADCASTING SERVICE,

*Intervenors.*

---

APPELLANT'S REPLY BRIEF

---

Ramsey Clark  
Kenneth C. Bass, III

PAUL, WEISS, GOLDBERG,  
RIFKIND, WHARTON &  
GARRISON  
1775 K Street, N.W.  
Washington, D.C. 20006

*Attorneys for Appellant*

*United States Court of Appeals*  
*the District of Columbia Circuit*

**RECEIVED**  
APR 12 1971

*Nathane J Paulson*

(i)

## TABLE OF CONTENTS

	<u>Page</u>
I. The So-Called "25% White Area" Rule Cannot Validly Be Applied to Deny this Application . . . . .	1
II. WAIT'S Willingness to Accept a Conditional Waiver Eliminates Any Valid Objections to this Proposal . . . . .	3
III. The Extent of Existing Nighttime Service in the Chicago Area is Irrelevant to this Application . . . . .	4
IV. WAIT'S Proposed Operations Would Not Cause Objectionable Interference in Any "White Area" or to WCCO or WGY . . . . .	5
V. WAIT Has Not Followed the Wrong Procedure by Not Requesting Rule-Making in this Case . . . . .	6
IV. Conclusion . . . . .	8

## AUTHORITIES CITED

### *Cases:*

Interstate Broadcasting Co. v. FCC, 116 U.S. App. D.C. 327, 323 F.2d 797 (1963) . . . . .	6
Rio Grande Family Radio Fellowship, Inc. v. F.C.C., 132 U.S. App. D.C. 128, 406 F.2d 664 (1968) . . . . .	6
WAIT v. FCC, 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) . . . . .	7

### *Miscellaneous:*

Communications Act of 1934 . . . . .	2, 8
--------------------------------------	------

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,762

---

WAIT RADIO, a co-partnership,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee,*  
MIDWEST RADIO-TELEVISION, INC., CARTER  
PUBLICATIONS, INC., CLEAR CHANNEL  
BROADCASTING SERVICE,  
*Intervenors.*

---

APPELLANT'S REPLY BRIEF

---

I.

THE SO-CALLED "25% WHITE AREA" RULE CANNOT VALIDLY  
BE APPLIED TO DENY THIS APPLICATION

The Commission and Intervenors contend that WAIT's Waiver Application must be denied since the proposal would not provide the first nighttime primary service to any "white area" (Applee. Br. 26-33; Int. Br. 5-8).<sup>1</sup> WAIT

---

<sup>1</sup>Abbreviations are as follows: "Applee. Br." - Brief for Appellee; "Int. Br." - Joint Brief for Intervenors; - "Br." - Brief for Appellant; "App." - Joint Appendix.

adheres to its position that the rules embodying this requirement do not apply to this application. (Br. 14-15). However, if those rules do apply, the Commission's refusal to waive them in this case amounts to an overbreadth of regulation.

As WAIT has shown, the purpose of the Communications Act of 1934, viewed in light of the First Amendment, is to maximize the number and variety of radio signals available to the listening public. In general the Commission's engineering rules were designed to further this policy by preventing unnecessary and excessive radio interference. The Commission and the Intervenor apparently contend in this case that there is a separate and distinct policy requiring that proposals for new nighttime radio service *must* provide a first primary service to some "white areas," regardless of any interference considerations. The opposing briefs imply that even if WAIT's proposed operations were to cause absolutely no interference to other stations, the proposal should still be denied because it does not provide new service to any "white area." In short, the Commission and the Intervenor apparently contend that proposed nighttime operations on a clear channel must not only fully protect existing radio service to "white areas," but must also provide new service to those areas. WAIT, on the other hand, contends that if existing service to "white areas" is fully protected, an application for new nighttime service should be granted regardless of the absence of new service to "white areas." Otherwise denial of the application amounts to a waste of the available radio spectrum.

The opponents' position is a fundamental misconception of the Commission's regulatory function. That function is to maximize radio communication. WAIT's proposal for additional nighttime service in Chicago offers an improvement over existing radio services even though it does not provide new service to "white areas." If the proposal did

provide such new service it would be even better;<sup>2</sup> but new service to Chicago alone is still better than no new service at all.

## II.

### **WAIT'S WILLINGNESS TO ACCEPT A CONDITIONAL WAIVER ELIMINATES ANY VALID OBJECTIONS TO THIS PROPOSAL.**

The Commission's objection to providing a new nighttime service in Chicago without providing new service to "white areas" might be understandable if WAIT's proposal would in fact "block another, apparently better proposal which would satisfy the rules."<sup>3</sup> (Applee. Br. 31). By agreeing to accept a conditional waiver, however, WAIT has guaranteed that its proposal will not prevent the Commission from granting any other application that is more in the public interest.

WAIT has stated on numerous occasions that it is willing to accept a nighttime waiver that would terminate automatically if the Commission ever issues a final order removing the 820 kHz channel from the category of unduplicated clear channels. In the context of this particular application it therefore makes no sense to justify the denial as an attempt to preserve the remaining unduplicated clear channels for future service to "white areas." If in fact it is

---

<sup>2</sup>It should be noted that the effect of applying the "25% White Area" Rule is to bar any new nighttime service to major metropolitan areas. Wherever a full-time, full-power station exists, no new station near the same location can provide service to "white areas" since the full-power station will have necessarily eliminated any "white areas" within its signal contour. Thus WAIT or any other station in a major metropolitan area can never satisfy the literal terms of this rule.

<sup>3</sup>The Commission apparently refers to the pending petition of WDAE to "break down" 820 kHz. (Applee. Br. 24). This petition has been pending before the Commission since July 1, 1969 with no action.

possible to utilize 820 kHz for service to "white areas," WAIT will automatically cease nighttime operations whenever such service is authorized.

This proposal would not as the Commission implies present any significant "practical problem of removing from the air a station which, under its conditional grant, has gained an audience in its service area." (Applee. Br. 36). WAIT will accept a conditional waiver with an automatic termination clause, thereby avoiding the necessity of any hearings or other Commission proceedings. The Commission's additional objection that termination of the conditional waiver would at that time deprive the public of a valuable radio service is inconsistent with its stated position that additional service to the Chicago nighttime audience is not in the public interest. The Commission cannot on the one hand maintain there is no need for WAIT's proposal, and on the other hand insist that once granted, the decision could not be reversed without depriving the public of a needed service.

### III.

#### THE EXTENT OF EXISTING NIGHTTIME SERVICE IN THE CHICAGO AREA IS IRRELEVANT TO THIS APPLICATION

In its brief the Commission repeatedly states that it is not in the public interest "to provide the Chicago area with its 26th nighttime broadcast service." (Applee. Br. 10, 21, 23, 25, 32, 33, 36). That observation again indicates the Commission's misunderstanding of the important First Amendment principles involved in this case.

The number of existing nighttime stations in Chicago is irrelevant.<sup>4</sup> It is *always* in the public interest to add an

---

<sup>4</sup>The Commission does not explain how it concluded there are 25 existing nighttime broadcast services in the Chicago area. Apparently this figure includes some stations operating only part-time at night (App. 25) as well as stations outside Chicago which serve only a small

additional station for Chicago or any other area, so long as the additional service does not cause objectionable interference to other stations or violate valid Commission policies. The Commission cannot have as a valid policy the goal of limiting Chicago or any other area to a fixed number of nighttime services.<sup>5</sup>

#### IV.

#### WAIT'S PROPOSED OPERATIONS WOULD NOT CAUSE OBJECTIONABLE INTERFERENCE IN ANY "WHITE AREA" OR TO WCCO OR WGY.

The intervenors attempt to paint a picture of massive nationwide interference from WAIT's proposed operations in an area extending from Texas through Minnesota and on to New York. (Int. Br. 4). Not only is this an exaggerated and misleading characterization, it is a picture based on technical considerations that are meaningless under the Commission's rules.

All of the so-called interference<sup>6</sup> cited by the Intervenor, with the exception of that occurring within the 0.5 mv/m-50% contour of WBAP, is irrelevant and not objec-

part of Chicago itself (App. 9). The Commission implies that 25 existing stations already serve the nighttime service area covered by WAIT's proposed operations. This implication is completely unsupported by the record and in fact many of the stations the Commission is apparently considering do not serve WAIT's proposed service area.

<sup>5</sup>It is particularly ironic that the Commission seeks to impose a ceiling on service in Chicago in spite of the fact that it fears granting WAIT's proposal would be an irrevocable decision since WAIT would acquire a substantial listening audience.

<sup>6</sup>It should be pointed out that the interference discussed throughout these proceedings is based solely on mathematical calculations pursuant to Commission rules and does not reflect actual measurements of signal strength at various locations. The Commission has established these rules of thumb for determining interference and bases its allocation policy in large part on such calculations. Depend-



tionable under Commission rules. (App. 239-241, 248-249, 285-289). It is based solely on the Intervenor's own private definition of interference. The Commission itself recognized that this interference does not violate any rule. (App. 296).

The Intervenor in essence seek a waiver of these technical rules for their own benefit to prevent granting of WAIT's application. They seek to do so without any showing of the "special circumstances" required by *Interstate Broadcasting Co. v. FCC*, 116 U.S. App. D.C. 327, 331, 323 F.2d 797, 801 (1963). WAIT contends that the rules defining objectionable interference can be waived only when special circumstances are shown and that the party seeking a waiver of those rules must overcome the same "high hurdle" which WAIT has been forced to jump. *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 132 U.S. App. D.C. 128, 130, 406 F.2d 664, 666 (1968).

Contrary to the Intervenor's argument, this Court has never decided what circumstances justify reliance on "non-objectionable" interference. The cases cited by the Intervenor (Int. Br. 10) are all *per curiam* decisions. Neither those orders nor the Commission decisions under review in those cases dealt with the issue WAIT presents in this case. It is basically lawless for an agency to issue rules and then ignore them without any explanation or reason for doing so, but that is precisely the course urged by the Intervenor.

#### V.

#### WAIT HAS NOT FOLLOWED THE WRONG PROCEDURE BY NOT REQUESTING RULE-MAKING IN THIS CASE.

At several points the Commission apparently takes the position that WAIT's proposal "should be pursued in the broad context of the rule making process rather than by waiver of the rule." (Applee. Br. 33, 37, 39). This sugges-

ing on the ratio of desired to undesired signal and "protected contour" that are selected, one can find "interference" at any place he chooses. The intervenors have adopted just such an arbitrary standard.

tion has already been rejected by this Court. "The Commission's view that WAIT's request for waiver must fall in the absence of an attack on the general rule . . . is without merit. The very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted." *WAIT v. FCC*, 135 U.S. App. D.C. 317, 321-22, 418 F.2d 1153, 1157-58 (1969). (App. 195). WAIT concedes that in most circumstances the engineering rules concerning "clear channels" properly define operations "in the public interest". WAIT recognizes that in many situations a case for waiving these rules cannot be made and therefore an applicant must, if it is to be successful, proceed via rule-making. But WAIT's proposal presents two unique factors which justify waiving the rules without the necessity of wholesale amendments. WAIT proposes night-time operations which will not cause objectionable interference in any "white area"<sup>7</sup> and which will automatically terminate in the event the Commission decides to duplicate the frequency by breaking down the 820 kHz channel through rule-making. The presence of these two unique factors fully justifies WAIT's decision to proceed with a waiver request, and they further require that the Commission grant that request.

---

<sup>7</sup>The Commission has mistakenly characterized WBAP's signal in the interference area as a "third or fourth primary" signal. (Applee. Br. 21). The record clearly shows WBAP's signal in this area is a sky-wave or "secondary" signal.

Finally, while both the Commission and the Intervenor take exception to WAIT's "Statement of Agreed Facts," (Applee. Br. 13; Int. Br.3), they do not dispute any of the basic facts set forth in that summary. They do quibble over characterizations based on those facts and emphasize they never "agreed" or "entered into any agreement of this sort." (Applee. Br. 13). WAIT never intended to imply the parties had "stipulated" as to these or any other facts. Our summary was merely an attempt to assist this Court by highlighting the basic facts involved. A fair reading of that summary will show it is neither one-sided, distorted, nor basically disputed.

## VI.

## CONCLUSION

The issue in this case is simple. The Communications Act of 1934 and the First Amendment forbid the FCC to waste communications resources. The Commission has yet to offer an adequate justification for its waste of the nighttime service WAIT would provide to approximately 4,400,000 people in the Chicago area. The orders below should be reversed and the case remanded to the Commission with instructions to waive the rules barring the application, accept it for filing and grant it.

Respectfully submitted,

Ramsey Clark  
Kenneth C. Bass, III  
PAUL, WEISS, GOLDBERG,  
RIFKIND, WHARTON &  
GARRISON  
1775 K Street, N.W.  
Washington, D.C. 20006  
*Attorneys for Appellant*

